

# AFTER THE SPILL IS GONE: THE GULF OF MEXICO, ENVIRONMENTAL CRIME, AND THE CRIMINAL LAW†

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*The Gulf oil spill was the worst environmental disaster in U.S. history, and will be the most significant criminal case ever prosecuted under U.S. environmental laws. The Justice Department is likely to prosecute BP, Transocean, and Halliburton for criminal violations of the Clean Water Act and the Migratory Bird Treaty Act, which will result in the largest fines ever imposed in the United States for any form of corporate crime. The Justice Department also may decide to pursue charges for manslaughter, false statements, and obstruction of justice. The prosecution will shape public perceptions about environmental crime, for reasons that are understandable given the notoriety of the spill and the penalties at stake. In some respects, the Gulf oil spill is similar to other environmental crimes, most notably because it involves large corporations that committed serious violations because they put profits before environmental compliance and worker safety. Yet the spill's most distinctive qualities make it an anomalous environmental crime: the conduct was not as egregious, the harm was far worse, and the penalties bear no relation to norms for environmental crime.*

*The Justice Department should bring criminal charges based on the Gulf oil spill, because a criminal prosecution will deter future spills better than civil penalties alone and will express societal condemnation of the negligence that caused the spill in ways that civil enforcement cannot. But criminal prosecution of the Gulf oil spill may raise questions about the role of criminal enforcement under the environmental laws, including whether ordinary negligence should result in criminal liability as well as what the proper*

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*normative relationship should be between culpable conduct and environmental harm. Nor can criminal prosecution, without more, prevent future spills; for that to occur, we must demand greater attention to safety and more rigorously enforce our drilling laws.*

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## INTRODUCTION

On April 20, 2010, an explosion rocked the *Deepwater Horizon* oil rig, killing eleven workers and triggering the worst environmental disaster in U.S. history. For nearly three months, oil gushed uncontrollably into the Gulf of Mexico. By the time the well was capped in July 2010, the government estimates that 4.9 million barrels of oil—more than 200 million gallons—had spewed from the well,<sup>1</sup> coating migratory birds, destroying pristine marshes, sullyng beaches, and inflicting incalculable damage to the ecosystem of the Gulf.

Although much of the oil dispersed quickly in the warm waters of the Gulf, reports vary widely about the long-term ecological effects of the spill.<sup>2</sup> One scientific journal reported a vast twenty-two-mile plume of oil on the

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1. JANE LUBCHENCO ET AL., NAT’L OCEANIC & ATMOSPHERIC ADMIN. ET AL., DEP’T OF COMMERCE ET AL., *BP DEEPWATER HORIZON OIL BUDGET: WHAT HAPPENED TO THE OIL?* 1 (2010) [hereinafter *OIL BUDGET*], available at [http://www.noaa.gov/stories2010/PDFs/OilBudget\\_description\\_%2083final.pdf](http://www.noaa.gov/stories2010/PDFs/OilBudget_description_%2083final.pdf); see also Timothy J. Crone & Maya Tolstoy, *Magnitude of the 2010 Gulf of Mexico Oil Leak*, 330 *SCIENCE* 634, 634 (2010) (estimating that the leak released 4.4 million barrels of oil).

2. See, e.g., Joel Achenbach & David Brown, *In gulf oil spill’s long reach, ecological damage could last decades*, *WASH. POST*, June 6, 2010, at A01; Campbell Robertson & John Collins Rudolf, *Cleanup and Questions Continue*, *N.Y. TIMES*, Nov. 3, 2010, at A16; David Biello, *How Long Will the Gulf of Mexico Oil Spill Last?*, *SCI. AM.* (May 14, 2010), <http://www.scientificamerican.com/article.cfm?id=how-long-will-oil-spill-last>.

floor of the Gulf.<sup>3</sup> Another report concluded that microbes had consumed whatever oil had not been siphoned from the well, had not been burned or skimmed at the surface, or had not chemically dispersed from the waters of the Gulf.<sup>4</sup> The National Oceanic and Atmospheric Administration (“NOAA”) established a blue-ribbon scientific panel in September 2010 to assess the impact of the oil spill,<sup>5</sup> a precursor to what is likely to be the largest natural resource damage claim ever sought under the environmental laws.<sup>6</sup> Whatever the fate of the visible oil, however, we may not know the extent of the environmental harm for years, since never before has so much oil spilled from an offshore well.

The economic hardship visited on coastal communities also may not be known for some time. NOAA banned fishing in approximately 36 percent of federal waters in the Gulf (nearly 87,000 square miles) at the height of the spill.<sup>7</sup> Although the ban was lifted and fisheries began to reopen by late summer 2010, the effect of the spill on spawning grounds and reproductive capacities is uncertain.<sup>8</sup> For many consumers, doubts remain about the effect of the oil on fish and shellfish, despite government claims that the fisheries are safe.<sup>9</sup> Similar uncertainty shrouds the future of tourism along the Gulf coast: beaches had reopened by late summer, and oil was no longer washing up on the shores, but it is not known when vacationers will return—or

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3. See Richard Camilli et al., *Tracking Hydrocarbon Plume Transport and Biodegradation at Deepwater Horizon*, 330 *SCIENCE* 201, 201 (2010).

4. See *OIL BUDGET*, *supra* note 1, at 1–3; see also Achenbach & Brown, *supra* note 2 (discussing the process of microbial breakdown of spilled hydrocarbon compounds).

5. Editorial, *Science and the Gulf*, *N.Y. TIMES*, Sept. 20, 2010, at A30.

6. The government obtained approximately \$900 million in natural resource damages for the *Exxon Valdez* oil spill. Cindy Chang, *Exxon Valdez: a glimpse of the future for Louisiana?*, *TIMES-PICAYUNE*, May 8, 2010, [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/exxon\\_valdez\\_a\\_glimpse\\_of\\_the.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/exxon_valdez_a_glimpse_of_the.html). It has been suggested that the ecological damage to Prince William Sound may have exceeded the harm to the Gulf because the Alaskan crude was thicker and because the temperatures were much cooler. The *Valdez* spill also occurred closer to shore. See *id.* Nonetheless, the sheer volume of the Gulf oil spill (twenty times greater than the *Valdez* spill, see Laura Moss, *The 13 Largest Oil Spills in History*, *MOTHER NATURE NETWORK* (Jul. 16, 2010, 12 PM), <http://www.mnn.com/earth-matters/wilderness-resources/stories/the-13-largest-oil-spills-in-history>) and the number of states suffering harm—along with the fact that one billion dollars in 1990 is a much larger sum today—make a multi-billion-dollar natural-resource damage claim likely as a result of the Gulf oil spill. Perhaps in recognition of these facts, BP agreed in April 2011 to make a one billion dollar advanced payment for Gulf coast restoration efforts. John M. Broder, *BP Agrees to Pay \$1 Billion for Start of Gulf Restoration*, *N.Y. TIMES*, Apr. 22, 2011, at A13.

7. Cutler Cleveland, *Deepwater Horizon oil spill*, *ENCYCLOPEDIA OF THE EARTH* (Dec. 5, 2010, 12:00 AM), [http://www.eoearth.org/article/Deepwater\\_Horizon\\_oil\\_spill](http://www.eoearth.org/article/Deepwater_Horizon_oil_spill).

8. *US Reopens Nearly 3000 More Square Miles of Gulf to Fishing*, *WALL ST. J.*, Oct. 5, 2010; *NOAA Reopens More than 4,000 Square Miles of Closed Gulf Fishing Area*, *NAT’L OCEANIC & ATMOSPHERIC ADMIN.* (Aug. 27, 2010), [http://www.noaanews.noaa.gov/stories2010/20100827\\_reopen.html](http://www.noaanews.noaa.gov/stories2010/20100827_reopen.html) [hereinafter *NOAA Reopens*]; see also Joel K. Bourne, Jr., *The Deep Dilemma*, *NAT’L GEOGRAPHIC*, Oct. 2010, at 40, 51–53 (reviewing, *inter alia*, the effects of the spill).

9. Tests by the Food and Drug Administration (“FDA”) and NOAA have shown that the level of oil-related chemicals in seafood samples are below the level of concern. *NOAA Reopens*, *supra* note 8. Nevertheless, Louisiana has asked BP for \$450 million to support testing and seafood marketing over the next two decades. Shaila Dewan, *Questions Linger as Shrimp Season Opens in Gulf*, *N.Y. TIMES*, Aug. 17, 2010, at A19.

whether they will return in prespill numbers.<sup>10</sup> Adding insult to injury, at least in the eyes of Gulf coast residents who work on offshore drilling platforms, the spill has raised questions about the efficacy of future drilling on the Gulf, which are likely to persist even though the government has lifted its moratorium on the issuance of new deepwater drilling permits.<sup>11</sup> New regulations have been imposed, and increased liability limits may follow in the wake of the Gulf spill,<sup>12</sup> which could slow the pace of future drilling and limit the number of companies involved—and, in the process, shed drilling jobs.<sup>13</sup>

Whatever the long-term ecological and economic impacts, the Gulf oil spill has been traumatic for a region still recovering from Hurricane Katrina. Once again, the region has experienced ecological devastation and economic dislocation. The federal government once more was ill-prepared in its disaster planning and emergency response.<sup>14</sup> In at least one significant respect, however, the Gulf oil spill is different: giant corporations, not forces of nature, visited this misery on the Gulf region. While there may have been a human dimension to both tragedies,<sup>15</sup> the heartache of the region and the outrage of the nation are focused on BP and the other companies involved in the spill, whose perceived willingness to put profits before safety wreaked such havoc. Hundreds of tort cases have been filed in response to the spill,<sup>16</sup>

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10. See generally OXFORD ECON., POTENTIAL IMPACT OF THE GULF OIL SPILL ON TOURISM (2010), available at [http://www.ustravel.org/sites/default/files/page/2009/11/Gulf\\_Oil\\_Spill\\_Analysis\\_Oxford\\_Economics\\_710.pdf](http://www.ustravel.org/sites/default/files/page/2009/11/Gulf_Oil_Spill_Analysis_Oxford_Economics_710.pdf).

11. Peter Baker & John M. Broder, *White House Lifts Ban on Deepwater Drilling*, N.Y. TIMES, Oct. 13, 2010, at A1. On May 6, 2010, Department of the Interior Secretary Ken Salazar imposed a moratorium on new offshore drilling pending an investigation into the spill, though existing projects were allowed to continue. NPR Staff & Wires, *Interior Secretary Halts Offshore Drilling Leases*, NAT'L PUB. RADIO (May 6, 2010), <http://www.npr.org/templates/story/story.php?storyId=126565762>. A revised ban was issued in July 2010 after a federal court enjoined the original moratorium. MSNBC.com Staff & News Serv. Reports, *Revised deep drilling moratorium is unveiled*, MSNBC.COM (July 12, 2010, 6:59 PM), <http://www.msnbc.com/id/38204465/ns/disaster-in-the-gulf>.

12. See, e.g., Baker & Broder, *supra* note 11 (“The [Department of the Interior’s Bureau of Ocean Energy Management, Regulation and Enforcement] estimates that compliance with the added regulations will cost the deepwater industry \$183 million a year, largely for changes in well design and the requirement that operators maintain subsea robots to operate blowout preventers in case primary control systems fail.”); see also Erica Werner, *WH wants increased industry liability in oil spill*, ASSOCIATED PRESS, May 12, 2010, available at 5/12/10 AP DataStream 20:40:15 (Westlaw) (“The White House asked Congress . . . to raise limits on BP’s liability . . . , approve new spending . . . and increase taxes on oil companies for an emergency cleanup fund.”).

13. Ben Casselman & Daniel Gilbert, *Drilling Is Stalled Even After Ban Is Lifted*, WALL ST. J., Jan. 3, 2011, at A1.

14. See, e.g., John M. Broder, *Reports Fault Administration on Spill*, N.Y. TIMES, Oct. 7, 2010, at A20; Ayesha Rascoe, *Oil spill response not up to date -panel co-chair*, REUTERS, Sept. 27, 2010, available at <http://www.reuters.com/assets/print?aid=USN2725932420100927>.

15. See, e.g., Spencer S. Hsu, *Katrina compensation urged as judge faults Army Corps*, WASH. POST, Nov. 20, 2009, at A03 (recounting a federal district court judge’s acknowledgement of the “monumental negligence” of the government in maintaining floodwater channels).

16. *In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, 731 F. Supp. 2d 1352, 1353 & n.1 (J.P.M.L. 2010) (consolidating seventy-seven civil actions and noting that there are more than 200 related civil actions).

and in December 2010, the Justice Department brought a civil suit against BP and eight other companies alleging Clean Water Act violations and seeking civil penalties, cleanup costs, and damages.<sup>17</sup>

Yet civil lawsuits based on the Gulf oil spill are just the beginning: the Justice Department will also bring criminal charges against BP, Transocean, and, in all likelihood, Halliburton.<sup>18</sup> The charges will include criminal violations of the Clean Water Act<sup>19</sup> and the Migratory Bird Treaty Act,<sup>20</sup> two of the environmental crimes charged in the *Exxon Valdez* case.<sup>21</sup> The charges are also likely to include manslaughter in violation of 18 U.S.C. § 1112 or under a seldom-used law known as the Seaman's Manslaughter Statute<sup>22</sup> to address the worker deaths. The Clean Water Act violations and manslaughter charges would require the government to show at least negligence; a violation of the Migratory Bird Treaty Act is a strict liability offense that was committed as soon as oil from the spill coated migratory birds. The Justice Department also could bring charges under the Marine Mammal Protection Act,<sup>23</sup> the Endangered Species Act,<sup>24</sup> and the Outer Continental Shelf Lands Act<sup>25</sup> to highlight the oil spill's effect on aquatic life

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17. Eric Holder, Attorney Gen., Dep't of Justice, Attorney General Eric Holder Announces Civil Lawsuit Regarding Deepwater Horizon Oil Spill (Dec. 15, 2010), <http://www.justice.gov/iso/opa/ag/speeches/2010/ag-speech-101215.html>.

18. See John Schwartz, *With Criminal Charges, Costs to BP Could Soar*, N.Y. TIMES, June 17, 2010, at A18; Marisa Taylor, *Criminal charges likely from Gulf oil spill, legal experts say*, MCCLATCHY NEWSPAPERS, May 12, 2010, <http://www.mcclatchydc.com/2010/05/12/94061/federal-laws-point-to-criminal.html>; *Justice Department Probes Spill; Charges Expected*, NAT'L PUB. RADIO (June 9, 2010), <http://www.npr.org/templates/story/story.php?storyId=127586497>.

19. Clean Water Act § 309(c)(1), 33 U.S.C. § 1319(c)(1) (2006) (negligent discharges in violation of 33 U.S.C. § 1321(b)(3)); 33 U.S.C. § 1319(c)(2) (knowing discharges in violation of 33 U.S.C. § 1321(b)(3)).

20. Migratory Bird Treaty Act § 2, 16 U.S.C. § 703(a) (2006) (prohibiting the unauthorized taking or killing of migratory birds); 16 U.S.C. § 707(a) (providing misdemeanor penalties for any violations of the provisions of the Migratory Bird Treaty Act).

21. Exxon Shipping Co. and Exxon Corp., No. 90-CR-00015 (D. Alaska 1991). In the *Exxon Valdez* case, the United States also charged strict liability violations of the Refuse Act, 33 U.S.C. §§ 407, 411, because the discharge occurred in navigable waters of the United States.

22. 18 U.S.C. § 1115 (2006) (providing felony sanctions for any vessel owner or person "through whose . . . neglect . . . the life of any person is destroyed"). There may be questions raised about whether federal manslaughter statutes apply when death occurs on foreign-flagged vessels operating within the exclusive economic zone of the United States, which is not within the territorial waters of the United States. Under 18 U.S.C. § 7(7), however, the special maritime and territorial jurisdiction of the United States extends to "[a]ny place outside the jurisdiction of any nation with respect to an offense committed . . . against a national of the United States."

23. Marine Mammal Protection Act § 102(a), 16 U.S.C. § 1372(a) (2006) (prohibiting the unauthorized taking of marine mammals in waters under the jurisdiction of the United States); 16 U.S.C. § 1375(b) (providing misdemeanor penalties for knowing violations of the Marine Mammal Protection Act).

24. Endangered Species Act § 9(a), 16 U.S.C. § 1538(a) (2006) (prohibiting the unauthorized taking of endangered species); 16 U.S.C. § 1540(b) (providing misdemeanor penalties for knowing violations of the Endangered Species Act).

25. Outer Continental Shelf Lands Act § 24(c), 43 U.S.C. § 1350(c) (2006) (providing felony penalties for knowing and willful violations of the Outer Continental Shelf Lands Act and the terms of any lease, license, or permit issued under the Act).

and any violations of drilling regulations, although each of these acts require proof that the defendants acted knowingly (and, in some cases, willfully). If there is evidence that corporate officials lied to the government about conditions at the well or about the amount of oil spewing into the Gulf, the Justice Department could also charge false statements and obstruction of justice.<sup>26</sup>

Once charging decisions are made, the Justice Department is likely to negotiate plea agreements that will be entered prior to indictment or shortly thereafter. BP faces a criminal penalty that will dwarf the \$150 million fine in the *Exxon Valdez* tragedy, which is currently the largest penalty ever imposed for environmental crime.<sup>27</sup> With damage estimates from the Gulf oil spill ranging from twenty billion dollars to fifty billion dollars,<sup>28</sup> BP could receive a multi-billion-dollar criminal fine, which would be the largest fine imposed in the United States for any corporate crime.<sup>29</sup> Transocean and Halliburton may incur criminal penalties in the hundreds of millions of dollars, and possibly even one billion dollars or more.

For many, the Gulf oil spill will become the paradigmatic case of environmental crime in the United States—and not just because it will produce record criminal fines. Intense media focus brought the spill into living rooms across America for nearly three months. The struggles of communities along the Gulf coast when so many Americans were reeling from a recession made BP a target of public anger and resentment, which only increased with reports about the billions of dollars that BP earns every year from its drilling activities,<sup>30</sup> and when BP's then-Chief Executive Officer Tony Hayward said “‘I'd like my life back’”<sup>31</sup> in the weeks after the spill. In

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26. 18 U.S.C. § 1001 (2006) (false statements); *id.* §§ 1503(a), 1505, 1512(c), 1519 (obstruction of justice). The Criminal Division of the Justice Department, which in March 2011 assumed leadership of the Gulf oil spill task force, is reportedly investigating possible securities violations as well. David Hammer, *BP officials queried in federal investigation into possibility of insider trading*, TIMES-PICAYUNE (Mar. 16, 2011, 10:30 PM), [http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/03/bp\\_officials\\_queried\\_in\\_federa.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/03/bp_officials_queried_in_federa.html).

27. See *infra* note 122 and accompanying text.

28. Compare OXFORD ECON., *supra* note 10, at 2 (projecting regional costs at \$22.7 billion), with Victoria Bryan, *BP to raise \$50 billion for oil spill costs: report*, REUTERS, June 20, 2010, available at <http://www.reuters.com/assets/print?aid=USTRE65J10G20100620> (suggesting BP's anticipation of costs as high as fifty billion dollars).

29. Under the Alternative Fines Act, 18 U.S.C. § 3571 (2006), the maximum criminal penalty for the Clean Water Act violations will be twice the losses resulting from the oil spill. See *infra* note 172. To date, the largest criminal fine—\$1.3 billion (along with \$1 billion in civil penalties)—was paid by Pfizer for marketing fraud. Gardiner Harris, *Pfizer Pays \$2.3 Billion to Settle Inquiry Over Marketing*, N.Y. TIMES, Sept. 3, 2009, at B4.

30. See, e.g., Nicholas Graham, *BP's Profits Far Outweigh The Cost Of Cleaning Up Gulf Oil Spill*, HUFFINGTON POST (May 27, 2010, 12:18 PM), [http://www.huffingtonpost.com/2010/05/27/bps-profits-far-outweigh\\_n\\_591992.html](http://www.huffingtonpost.com/2010/05/27/bps-profits-far-outweigh_n_591992.html).

31. Jad Mouawad & Clifford Krauss, *Another Torrent BP Works to Stem: Its C.E.O.*, N.Y. TIMES, June 4, 2010, at A1, available at <http://www.nytimes.com/2010/06/04/us/04image.html>. To some extent, Mr. Hayward's comment has been taken out of context: his statement came after a lengthy expression of regret and remorse about the spill. Nonetheless, his remarks reinforced public impressions of BP's troubled corporate culture.

the court of public opinion, BP already stands convicted,<sup>32</sup> and the eventual criminal prosecution of the Gulf oil spill will frame public perceptions about what constitutes environmental crime.

The Gulf oil spill is similar to other environmental crimes to the extent that it involves corporations that did not place sufficient emphasis on environmental protection and worker safety. In addition, investigators could develop evidence of deliberate violations or misleading conduct, which is typical in environmental criminal cases. Absent such evidence, however, the Gulf oil spill will be more anomalous than paradigmatic environmental crime. Most environmental crimes involve intentional acts of pollution, such as midnight dumping or efforts to hide illegal pollution; the Gulf oil spill does not. It is criminal only because the Clean Water Act contains negligence provisions, which are unusual under the environmental laws and are rarely charged. Likewise, most environmental crimes do not involve demonstrable harm to the environment or economic impact. The Gulf oil spill will be criminally prosecuted primarily because of the environmental and economic harm that it caused to the Gulf and the communities along its shores.

The Gulf oil spill warrants criminal prosecution despite its anomalies. There is substantial evidence that BP, Transocean, and Halliburton departed from industry standards in the drilling of the Macondo well. We expect companies engaged in deepwater drilling to demonstrate greater commitment to environmental protection and safety, particularly when their risky behavior can cause catastrophic harm. Criminal prosecution will deter future spills more than civil penalties alone and will ensure restitution to victims of the Gulf oil spill, which may be limited in civil cases because of the liability cap set by the Oil Pollution Act. Moreover, criminal prosecution will express societal condemnation of the conduct that caused the Gulf oil spill in ways that civil enforcement cannot, which is one of the purposes of the criminal law. Conversely, if the Justice Department were to decline criminal prosecution under the Clean Water Act and the Seaman's Manslaughter Statute, the government would send the wrong message about the ecological damage to the Gulf, the suffering of the communities along the Gulf coast, and the value of the lives of the workers who died when the *Deepwater Horizon* exploded.

Nonetheless, because of its anomalies, the Gulf oil spill may raise questions about the proper role of criminal enforcement under the environmental laws. The use of negligence charges in such a high-profile case may lend support to those who argue that the environmental laws do not contain adequate distinctions between conduct that is criminal and violations that should be addressed by civil penalties. The focus on harm may risk prosecutorial overreaching if we allow our after-the-fact outrage about the harm to

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32. In June 2010, a Washington Post-ABC News poll showed that 64 percent of Americans thought the federal government should pursue criminal charges against BP and the other companies involved in the Gulf oil spill. Jon Cohen, *Poll shows negative ratings for BP, federal government*, WASH. POST BEHIND THE NUMBERS (June 7, 2010, 12:00 PM), [http://voices.washingtonpost.com/behind-the-numbers/2010/06/poll\\_shows\\_negative\\_ratings\\_fo.html](http://voices.washingtonpost.com/behind-the-numbers/2010/06/poll_shows_negative_ratings_fo.html).

substitute for a sober assessment of how the prospective conduct was criminal. Criminal sanctions often are greater when harm occurs, but the dominant view among criminal law theorists is that the focus of the criminal law should be on the defendant's culpable conduct and state of mind, not the fortuity of whether harm ensues.

This Article considers criminal prosecution of the Gulf oil spill in the context of our still-emerging understanding of what constitutes environmental crime and our understanding of the criminal law more generally. Part I provides an overview of the events that led to the Gulf oil spill, the efforts to contain the spill, and the regulatory failures that may have contributed to the spill. Part II addresses the legal and factual bases for criminal prosecution of the Gulf oil spill, along with the discretionary factors that make criminal prosecution likely. Part III asserts that the Gulf oil spill will be viewed by many as the paradigmatic environmental crime and explains why that perception is wrong. Part IV argues that criminal prosecution of the Gulf oil spill is appropriate under a deterrence theory of criminal law and because it expresses societal condemnation of the spill, but that the ways in which the case is anomalous raise issues about the role of criminal enforcement under the environmental laws. The Article concludes that criminal prosecution, although warranted, is not a substitute for more vigilant regulation of offshore drilling and more vigorous enforcement of offshore drilling laws.

### I. A "NIGHTMARE WELL": AN OVERVIEW OF THE WORST ACCIDENTAL OFFSHORE OIL SPILL IN HISTORY

The Macondo well, located approximately seventy miles southeast of Venice, Louisiana<sup>33</sup> and leased to BP Exploration and Production, Inc., Anadarko Petroleum Corporation, and MOEX Offshore (a subsidiary of Mitsui Corporation),<sup>34</sup> was troubled long before the blowout that resulted in the largest accidental offshore oil spill in history.<sup>35</sup> BP hired Transocean to

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33. *Response Efforts to the Gulf Coast Oil Spill: Hearing Before S. Comm. on Commerce, Sci., & Transp.*, 111th Cong. 1 (2010) [hereinafter *Response Efforts Hearing*] (statement of Admiral Thad Allen, National Incident Commander), available at <http://commerce.senate.gov> (click "Hearings" tab; then change "Browse by" boxes to "May" and "2010"; then click "Go").

34. BP owned 65% of the well; Anadarko owned 25%, and Mitsui owned 10%. See Lease Owner Data for Lease G32306, BUREAU OCEAN ENERGY MGMT., REG. & ENFORCEMENT, <http://www.gomr.boemre.gov/homepg/fastfacts/leaseowner/master.asp> (check "Lease Number" box; then type "G32306" in Lease Number text entry field; then click "Submit" button) (last visited Mar. 4, 2011); Yuji Okada & Shigeru Sato, *Mitsui's MOEX Withholds \$480 Million Costs From BP*, BLOOMBERG BUSINESSWEEK, Aug. 3, 2010, <http://www.businessweek.com/news/2010-08-03/mitsui-s-moex-withholds-480-million-costs-from-bp.html>.

35. Previously, the largest accidental offshore oil spill was the Ixtoc I spill off the coast of Mexico in 1979, which lasted nearly a year and which resulted in the release of 454,000 tons of crude. Remy Melina, *Top 10 worst oil spills*, MSNBC.COM (Apr. 29, 2010, 1:45:56 PM), [http://www.msnbc.msn.com/id/36852827/ns/us\\_news-environment/](http://www.msnbc.msn.com/id/36852827/ns/us_news-environment/). The largest offshore spill of any kind occurred in 1991 during the first Gulf War, when Saddam Hussein ordered the intentional discharge of nearly 1.5 million tons of oil from wells and pipelines as Iraqi forces retreated from Kuwait. See *id.*



drill the well in October 2009, but drilling was halted after just thirty-four days because of Hurricane Ida.<sup>36</sup> The original rig was damaged by the storm, so Transocean brought in the *Deepwater Horizon*—the workhorse of the Transocean fleet—to drill the well beginning in February 2010.<sup>37</sup>

During the next two months, *Deepwater Horizon* experienced disruptions that foreshadowed the events to come. In March, the rig's drill pipe became stuck as it bored down, forcing Transocean to drill around the blockage.<sup>38</sup> The rig subsequently began to experience "well-control" problems.<sup>39</sup> Drilling mud disappeared into cracks in the formation, and "violent 'kicks' of gas and oil" halted drilling for more than a week.<sup>40</sup> By April 2010, the well was weeks behind schedule, which was costing BP approximately \$500,000 per day.<sup>41</sup> A week before the blast, an engineer called Macondo a "nightmare well,"<sup>42</sup> while others called it the "well from hell."<sup>43</sup>

In addition to the problems with the Macondo well, there were issues on the *Deepwater Horizon* rig. Transocean commissioned a survey of rig workers, many of whom stated they were concerned about their safety and feared retaliation if they reported problems.<sup>44</sup> An equipment assessment showed that many key components of the rig, including the blowout preventer, had not been fully inspected since 2000.<sup>45</sup> BP conducted a maintenance audit in September 2009, which indicated that 3,500 hours of necessary work had not been performed on the rig;<sup>46</sup> Minerals Management Service ("MMS") and Coast Guard reports revealed that the *Deepwater Horizon* had experienced a series of spills, fires, and even a collision, due to equipment malfunction, faulty human operation, and bad weather, during the nine years that the rig drilled for BP.<sup>47</sup>

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36. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 92 (2011) [hereinafter NATIONAL COMMISSION REPORT], available at [http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER\\_ReporttothePresident\\_FINAL.pdf](http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf).

37. *Id.*

38. Bourne, Jr., *supra* note 8, at 45.

39. *Id.*

40. David Barstow et al., *Deepwater Horizon's Final Hours*, N.Y. TIMES, Dec. 26, 2010, at A1.

41. Bourne, Jr., *supra* note 8, at 45; see also Barstow et al., *supra* note 40.

42. Bourne, Jr., *supra* note 8, at 45.

43. Barstow et al., *supra* note 40.

44. Ian Urbina, *Workers on Doomed Rig Voiced Concern on Safety*, N.Y. TIMES, July 22, 2010, at A1.

45. Guidelines require inspection every three to five years. *Id.*

46. *Id.*

47. Frank Jordans & Garance Burke, *Deepwater Horizon rig had history of spills, fires before big Gulf of Mexico oil spill*, NOLA.COM, Apr. 30, 2010, [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/04/deepwater\\_horizon\\_rig\\_had\\_hist.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/04/deepwater_horizon_rig_had_hist.html).

Despite the challenges it presented, the Macondo well was a valuable find: the reservoir contained at least fifty million barrels of oil.<sup>48</sup> BP decided to stop exploratory drilling and to prepare the well for future production.<sup>49</sup> In doing so, however, BP took a number of steps that may have increased the risk of a blowout.<sup>50</sup> BP decided to use single-walled piping, the quickest method for drilling a production well but one that offered fewer protective barriers to prevent leakage.<sup>51</sup> BP determined that it was not necessary to circulate the drilling mud before installing a cement seal on the well, which helps the cement cure properly.<sup>52</sup> BP chose to install only six of the twenty-one cement spacers recommended by Halliburton.<sup>53</sup> BP also concluded that it was unnecessary to conduct a cement bond test, which might have revealed that explosive gas had seeped into pipes during the cementing process. As it prepared to disconnect the rig from the well, BP decided to remove the drilling mud and replace it with seawater—even though “repeated negative-pressure tests clearly showed a marked pressure buildup inside the casing after the drilling mud was displaced with sea water.”<sup>54</sup>

On April 20, 2010, rig workers were in the final stages of shutting down the well for future production.<sup>55</sup> Unfortunately, the workers did not know that gas was escaping from the well. Workers may have been preoccupied by a “sheen test” they were conducting on the drilling mud just before the explosion<sup>56</sup>—a distraction that could have been avoided had earlier negative-pressure tests<sup>57</sup> been interpreted properly.<sup>58</sup> Other warning signs were missed as well.<sup>59</sup> By the time, workers realized a blowout was occurring, it was too late: “[G]as was already above the [blowout preventer], rocketing up the riser, and expanding rapidly.”<sup>60</sup> When the gas reached the *Deepwater*

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48. NATIONAL COMMISSION REPORT, *supra* note 36, at 94.

49. *Id.*

50. See generally NAT'L ACADS., INTERIM REPORT ON CAUSES OF THE DEEPWATER HORIZON OIL RIG BLOWOUT AND WAYS TO PREVENT SUCH EVENTS 5–9 (2010), available at <http://www.nap.edu/catalog/13047.html> (click the “DOWNLOAD FREE PDF” button).

51. Tim Dickinson, *The Spill, the Scandal and the President*, ROLLING STONE, June 24, 2010, at 54, 60.

52. See Bourne, Jr., *supra* note 8, at 46.

53. Dickinson, *supra* note 51, at 60.

54. NAT'L ACADS., *supra* note 50, at 9. Although there are “no formal guidelines for the interpretation and approval of the test results, it is clear that pressure buildup or flow out of a well [was] an irrefutable sign that the cement did not establish a flow barrier.” *Id.* at 10; see also Barstow et al., *supra* note 40.

55. David Barstow et al., *Between Blast and Spill, One Last, Flawed Hope*, N.Y. TIMES, June 22, 2010, at A1.

56. NATIONAL COMMISSION REPORT, *supra* note 36, at 112.

57. See *supra* note 54 and accompanying text.

58. NAT'L ACADS., *supra* note 50, at 10.

59. *Id.* at 10–11 (“Had meaningful oversight of data on flow in and flow out been realized during cementing operations, problems with the cementing operations might have been recognized earlier . . .”).

60. NATIONAL COMMISSION REPORT, *supra* note 36, at 114.

*Horizon*, it was like “‘a 550-ton freight train hitting the rig floor,’ followed by . . . ‘a jet engine’s worth of gas . . . .’”<sup>61</sup> At that point, an explosion and fire were inevitable.<sup>62</sup>

As the blast rocked the *Deepwater Horizon*, the “blind shear ram” on the blowout preventer should have closed off the gushing well.<sup>63</sup> When a rig worker pressed an emergency button immediately after the explosion, however, the blind shear ram failed to fully deploy.<sup>64</sup> Two backup systems designed to activate the blowout preventer—known as the “deadman” system and the “autoshear”—also failed in subsequent days.<sup>65</sup> Compounding matters, the blowout preventer lacked a remote-controlled shutoff fail-safe switch—required by law in Norway and Brazil as final protection against underwater spills.<sup>66</sup> An expert report commissioned by the government concluded that the blowout preventer failed because the riser pipe was not centered properly and buckled when the blowout occurred, which made it impossible for the blind shearing ram to deploy properly.<sup>67</sup> Previous reports, indicated, however, “that the blowout preventer may have been crippled by poor maintenance.”<sup>68</sup>

After the *Deepwater Horizon* exploded, firefighters rushed to extinguish flames from the approximately 700,000 gallons of diesel fuel on board the rig. Within hours, 115 of the 126 rig workers were rescued, but the remaining 11 workers perished.<sup>69</sup> Rig workers testified that “alarms and safety systems on the rig failed to operate as intended, potentially affecting the time available for personnel to evacuate.”<sup>70</sup> After more than two days ablaze,

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61. *Id.* (quoting testimony of Transocean official Bill Ambrose).

62. *Id.*

63. Barstow et al., *supra* note 55. *But see* NAT’L ACADS., *supra* note 50, at 12–13 (noting that further investigation into “the design, test, and maintenance of” the blowout preventer system is necessary and underway).

64. Barstow et al., *supra* note 55.

65. *Id.*; *see also* NATIONAL COMMISSION REPORT, *supra* note 36, at 115 (describing failure of the deadman system).

66. Cleveland, *supra* note 7. “Federal regulators had specifically exempted the *Deepwater Horizon* from having such a remote shutoff switch partially on the grounds of the costliness of the device,” which was valued at roughly \$500,000, or “less than one percent of the *Deepwater Horizon* capital cost.” *Id.*

67. Det Norske Veritas, Final Report for the U.S. Dep’t of the Interior: Forensic Examination of Deepwater Horizon Blowout Preventer, 4–5, 173–76, Mar. 20, 2011, *available at* <http://www.deepwaterinvestigation.com/external/content/document/3043/1047291/1/DNV%20Report%20EP030842%20for%20BOEMRE%20Volume%20I.pdf>.

68. Barstow et al., *supra* note 40 (“Investigators have found a host of problems—dead batteries, bad solenoid valves, leaking hydraulic lines—that were overlooked or ignored. Transocean had also never performed an expensive 90-day maintenance inspection that the manufacturer said should be done every three to five years.”).

69. *Response Efforts Hearing*, *supra* note 33.

70. NAT’L ACADS., *supra* note 50, at 13; *see also* Barstow et al., *supra* note 40 (“For nine long minutes, as the drilling crew battled the blowout and gas alarms eventually sounded on the bridge, no warning was given to the rest of the crew. For many, the first hint of crisis came in the form of a blast wave.”).

the rig sank into the nearly mile-deep water.<sup>71</sup> On April 23, remotely operated vehicles located the rig on the seafloor.<sup>72</sup> The next day, BP identified the first two leaks in the riser pipe and alerted the federal government.<sup>73</sup>

Within a week, government officials reported that the well was spewing over 5,000 barrels, or more than 200,000 gallons, of oil per day.<sup>74</sup> BP tried a number of different measures to control the well, including a procedure called “top kill,” which involved injecting mud in the well,<sup>75</sup> and a procedure referred to as “top cap,” which involved cutting the riser pipes, removing the malfunctioning blowout preventer, and placing a large cap over the well head.<sup>76</sup> None of these efforts succeeded, however, and the removal of the blowout preventer increased the flow rates from the well to between 35,000 and 60,000 barrels per day.<sup>77</sup>

As efforts to seal the well foundered, BP attempted to collect or disperse the oil before it reached the Gulf coast. By May 13, 2010, more than five million gallons of oily water had been recovered using mechanical surface-cleaning methods.<sup>78</sup> BP applied nearly half a million gallons of dispersants to break up the oil slick and used controlled burns to eliminate surface oil.<sup>79</sup> Meanwhile, government officials, working alongside BP, placed more than a million feet of boom in shallow waters of the Gulf to protect sensitive marshes and wetlands.<sup>80</sup>

The oil first touched land in Louisiana, and tar balls and oil mousse reached the coasts of Mississippi, Alabama, and Florida in June.<sup>81</sup> Beaches were stained, marshy wetlands were infiltrated, and waterfowl became cov-

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71. Cleveland, *supra* note 7.

72. *See id.*

73. *Id.*

74. Briefing Memo, Committee on Energy and Commerce, Hearing on Inquiry into the Deepwater Horizon Gulf Coast Oil Spill, 1 (May 10, 2010), available at [http://democrats.energycommerce.house.gov/Press\\_111/20100510/Briefing.Memo.oi.05.10.2010.pdf](http://democrats.energycommerce.house.gov/Press_111/20100510/Briefing.Memo.oi.05.10.2010.pdf). When the spill began, BP officials had estimated that only 1,000 barrels of oil per day were leaking from the Macondo well. *Id.*

75. Leslie Kaufman & Clifford Krauss, *BP Says Its Latest Effort To Stop Gulf Leak Failed*, N.Y. TIMES, May 30, 2010, at A1.

76. CBS/Associated Press, *BP Admits “Top Kill” Fails, Will Try Cap Next*, CBS NEWS, May 30, 2010, <http://www.cbsnews.com/stories/2010/05/29/business/main6530758.shtml>.

77. Joel Achenbach & David Fahrenthold, *Oil-spill flow rate estimate surges to 35,000 to 60,000 barrels a day*, WASH. POST (June 16, 2010, 9:30 PM), [http://www.washingtonpost.com/wp-dyn/content/article/2010/06/15/AR2010061504267\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/06/15/AR2010061504267_pf.html). The National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling reported in October 2010 that the government repeatedly underestimated how much oil was flowing into the Gulf of Mexico. Broder, *supra* note 14.

78. *Response Efforts Hearing*, *supra* note 33, at 3.

79. *Id.*

80. *See id.*

81. *Gulf of Mexico Oil Spill (2010)*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/o/oil\\_spills/gulf\\_of\\_mexico\\_2010/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/o/oil_spills/gulf_of_mexico_2010/index.html) (last updated Mar. 2011).

ered in oil.<sup>82</sup> The spill produced an oil slick in the Gulf extending nearly 29,000 square miles—about the size of South Carolina.<sup>83</sup> As the oil spread, scientists expressed concern that as many as thirty-two National Wildlife Refuges could be affected<sup>84</sup> and that the oil could enter Gulf “feedback” loops that would carry the oil into the Florida Keys and to the East Coast of the United States.<sup>85</sup>

The spill finally ceased in mid-July when BP installed a much tighter cap on the well and then slowly closed a series of valves.<sup>86</sup> The well was pronounced “dead” on September 19, 2010 after the successful drilling of a relief well and the installation of a final, permanent cement plugging.<sup>87</sup> The federal government estimates that nearly five million barrels of oil escaped, although approximately 800,000 barrels was siphoned from the well.<sup>88</sup> Scientists remain uncertain about how the remaining oil will affect aquatic life.<sup>89</sup>

The precise cause of the blowout and subsequent explosion on the *Deepwater Horizon* may never be known.<sup>90</sup> Transocean Chief Executive Officer Steven Newman pointed to “a sudden, catastrophic failure of the cement, the casing or both.”<sup>91</sup> BP and congressional investigators have suggested that the cement seal failed to prevent gas from rising up in the well.<sup>92</sup> The presidential commission on the Gulf oil spill has determined that the

82. *E.g., id.*; David Muir et al., *BP's Top Cap is Working, But Oil Spill is Still Spreading*, ABC NEWS, June 7, 2010, <http://abcnews.go.com/WN/Media/bp-top-cap-success-shore-cleanup-proves-difficult/story?id=10849580>.

83. Cleveland, *supra* note 7.

84. *Id.*

85. MSNBC.com News Servs., *Oil fallout: Feds expand Gulf fishing ban*, MSNBC.COM (May 18, 2010, 3:29:11 PM), <http://www.msnbc.msn.com/id/37212911/>.

86. See Jonathan Corum et al., *Methods That Have Been Tried to Stop the Leaking Oil*, N.Y. TIMES, <http://www.nytimes.com/interactive/2010/05/25/us/20100525-topkill-diagram.html> (last updated Aug. 17, 2010).

87. Harry R. Weber, *Blown-out BP well finally killed at bottom of Gulf*, ASSOCIATED PRESS, Sept. 19, 2010, available at 9/19/10 AP DataStream 18:30:50 (Westlaw).

88. Crone & Tolstoy, *supra* note 1, at 634. An August 4 report estimated that one quarter of the oil was burned, skimmed, or siphoned from the well, that another quarter naturally evaporated or dissolved, and that a third quarter dispersed in the Gulf. Cleveland, *supra* note 7. The remaining quarter, according to the report, is either on or “below the surface as light sheen and weathered tar balls, has washed ashore or been collected from the shore, or is buried in sand and sediments.” LUBCHENCO ET AL., *supra* note 1, at 1.

89. See *Gulf of Mexico Oil Spill (2010)*, *supra* note 81. Two government reports have found low concentrations of toxic compounds deep in the ocean, but questions remain about issues such as an apparent decline in oxygen levels in the water. *Id.*

90. NATIONAL COMMISSION REPORT, *supra* note 36, at 115.

91. Justin Gillis & John M. Broder, *Nitrogen-Cement Mix Is Focus of Gulf Inquiry*, N.Y. TIMES, May 11, 2010, at A13.

92. Henry Fountain & Tom Zeller Jr., *Panel Suggests Signs of Trouble Before Rig Blast*, N.Y. TIMES, May 26, 2010, at A1; see also INCIDENT INVESTIGATION TEAM, BP, *Deepwater Horizon ACCIDENT INVESTIGATION REPORT 49–180 (2010)*, available at [http://www.bp.com/liveassets/bp\\_internet/globalbp/globalbp\\_uk\\_english/incident\\_response/STAGING/local\\_assets/downloads\\_pdfs/Deepwater\\_Horizon\\_Accident\\_Investigation\\_Report.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report.pdf) (drawing comparable conclusions).

cement used by Halliburton was unstable, which “may have contributed to the blowout.”<sup>93</sup> Indeed, there is evidence that Halliburton’s tests revealed that the cement was unstable.<sup>94</sup> Halliburton insists that it shared the results of its tests with BP, however, and that BP, which failed to conduct additional testing, is responsible for any problems with the cement.<sup>95</sup>

What appears certain, however, is that BP, Transocean, and Halliburton had inadequate management controls to prevent the tragedy that occurred on the *Deepwater Horizon*. An interim report by the National Academy of Sciences concluded that the problems on the *Deepwater Horizon* reflected an inferior system for managing the “exceedingly complex” operations of offshore engineering and drilling.<sup>96</sup> The report indicated that management decisions vacillated between individuals and combinations of various companies, while personnel changes occurred just prior to sensitive procedures.<sup>97</sup> These problems, combined with a lack of oversight from shore-based personnel, “suggest[] a lack of onboard expertise and of clearly defined responsibilities and the associated limitations of authority.”<sup>98</sup>

The presidential commission on the Gulf oil spill reached similar conclusions to the National Academy of Sciences. “The most significant failure at Macondo—and the clear root cause of the blowout—was a failure of industry management.”<sup>99</sup> The presidential commission cited BP’s poor risk assessment; Halliburton and BP’s failure to ensure that cement was adequately tested; communication problems among BP, Transocean, and Halliburton; Transocean’s failure to communicate to its crew lessons from “an eerily similar near-miss” on one of its North Sea rigs; and a collective failure to consider the risks associated with “time- and money-saving decisions.”<sup>100</sup>

The Gulf oil spill exposed significant regulatory shortcomings within MMS, the Interior Department agency responsible for overseeing drilling

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93. See Letter to the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Oct. 28, 2010, available at <http://graphics8.nytimes.com/packages/pdf/science/spilldoc.PDF>; *BP knew cement was poor quality before its use in well Testing showed flaws weeks before the gulf explosion that killed 11*, L.A. TIMES, Oct. 29, 2010, at 1.

94. *Id.*

95. See Press Release, Halliburton, Halliburton Comments on National Commission Cement Testing (Oct. 28, 2010), available at [http://www.halliburton.com/public/news/pubsdata/press\\_release/2010/corpnws\\_102810.html](http://www.halliburton.com/public/news/pubsdata/press_release/2010/corpnws_102810.html).

96. See NAT’L ACADS., *supra* note 50, at 14–16.

97. *Id.*

98. *Id.* at 14. Additionally, testimony has indicated that “standards for education, training, and professional certification of private-sector decision-making personnel involved in drilling operations are relatively minimal compared with other safety-critical industries.” *Id.* at 15.

99. NATIONAL COMMISSION REPORT, *supra* note 36, at 122.

100. *Id.* at 122–26. An April 2011 Coast Guard report also faulted Transocean’s management systems and safety culture. John M. Broder, *Companies, Crews and Regulators Share Blame in Coast Guard Report on Oil Spill*, N.Y. TIMES, Apr. 23, 2011, at A9.

safety.<sup>101</sup> MMS regulations, which involve only limited review of drilling activity, are heavily based on data provided by the oil companies.<sup>102</sup> MMS did not impose requirements for conducting either negative-pressure tests or cement testing, the inadequacy of which contributed to the Macondo blow-out.<sup>103</sup> Moreover, MMS was understaffed,<sup>104</sup> and inspectors received primarily on-the-job training that did not keep pace with technological advancements.<sup>105</sup> MMS emphasized compliance counseling over enforcement, and its civil penalty regulations were not commensurate with the seriousness of the violations and threats to human health and the environment.<sup>106</sup>

MMS oversight of the exploration of the Macondo well was similarly deficient. MMS did not conduct a full review of the potential environmental impact of issuing a permit for the Macondo well, because it had granted a “categorical exclusion” from the National Environmental Policy Act for individual exploration plans.<sup>107</sup> MMS accepted an exploration and environmental impact plan from BP that failed to consider a total blowout and lacked any site-specific plan to respond to a spill, but referred instead to the protection of species that do not live in the Gulf, including walrus. <sup>108</sup> Nor was MMS

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101. According to Interior Department investigations, MMS managers received bonuses for expediting risky offshore oil leases. Auditors were instructed not to investigate questionable deals. The oil industry gave agency safety inspectors gifts and allegedly even drafted inspection reports for the MMS to accept as their own. Dickinson, *supra* note 51, at 56.

102. See *The Deepwater Horizon Incident: Are the Minerals Management Service Regulations Doing the Job?: Oversight Hearing Before the Subcomm. on Energy and Mineral Res. of the H. Comm. on Natural Res.*, 111th Cong. 14–15 (2010) [hereinafter *MMS Hearing*] (statement of Mary L. Kendall, former Acting Inspector General for the Department of the Interior); see also NAT’L ACADS., *supra* note 50, at 18 (“It is not apparent to the committee that MMS had sufficient in-house expertise and technical capabilities to independently evaluate the adequacy of the technological standards and practices that industry developed for deepwater drilling.”).

103. See NATIONAL COMMISSION REPORT, *supra* note 36, at 126. Another factor in the disaster could have been federal regulation of well cementing, which fails to specify the type of cement required. Mitch Weiss & Jeff Donn, *AP Impact: Bad cement jobs plague offshore rigs*, ASSOCIATED PRESS, May 24, 2010, available at 5/24/10 AP Datastream 04:40:34 (Westlaw). Companies are simply “urged” to follow American Petroleum Institute guidelines. In contrast, more specific standards exist on cement work for roads, bridges, and buildings. The MMS identified “cementing as a factor in 18 of 39 well blowouts at Gulf rigs from 1992 to 2006.” *Id.*

104. MMS employed approximately 60 inspectors for the Gulf’s 4,000 facilities, compared with 10 inspectors for 23 facilities in the Pacific. *MMS Hearing*, *supra* note 102, at 14 (statement of Mary L. Kendall, former Acting Inspector General for the Department of the Interior).

105. See *MMS Hearing*, *supra* note 102, at 14 (statement of Mary L. Kendall, former Acting Inspector General for the Department of the Interior); see also NAT’L ACADS., *supra* note 50, at 16; NATIONAL COMMISSION REPORT, *supra* note 36, at 126.

106. *MMS Hearing*, *supra* note 102, at 14–15 (statement of Mary L. Kendall, former Acting Inspector General for the Department of the Interior).

107. Cleveland, *supra* note 7; Dickinson, *supra* note 51. In a 2007 Environmental Impact Statement regarding drilling leases for 2007–2012 for the region encompassing the Macondo well, the MMS stated, “Offshore oil spills resulting from a proposed action are not expected to damage significantly any wetlands along the Gulf Coast . . . Overall, impacts to wetland habitats from an oil spill associated with activities related to a proposed action would be expected to be low and temporary.” Cleveland, *supra* note 7 (alteration in original).

108. Bourne, Jr., *supra* note 8, at 50; Dickinson, *supra* note 51, at 58. Moreover, among its equipment providers for spill response, BP listed the website of a Japanese home-shopping network. Dickinson, *supra* note 51, at 59.

more vigilant when it reviewed requests from BP during the drilling process. MMS granted BP an exception from its regulations regarding the placement of cement plugs for temporary abandonment in less than ninety minutes.<sup>109</sup> Tragically, MMS did not, according to the presidential commission, “assess the full set of risks presented by the temporary abandonment procedure.”<sup>110</sup>

In response to the regulatory and oversight failures at MMS, Interior Secretary Ken Salazar announced in June 2010 that MMS would be reorganized as the Bureau of Ocean Energy Management, Regulation and Enforcement and that separate divisions within the new bureau would be responsible for permitting, royalty collection, and enforcement.<sup>111</sup> A significant unanswered question is whether the complicity of MMS in the Gulf oil spill will hinder the government’s enforcement actions.<sup>112</sup>

## II. THE LEGAL AND FACTUAL BASES FOR CRIMINAL PROSECUTION OF THE GULF OIL SPILL

A catastrophic oil spill that brought death, ecological devastation, and suffering to communities along the Gulf was bound to result in a criminal investigation. In most cases where an environmental incident causes significant harm to public health or the environment, the Justice Department considers whether criminal enforcement is appropriate.<sup>113</sup> As a result, while the Coast Guard, the Environmental Protection Agency (“EPA”), NOAA, and MMS led the government’s emergency response efforts, federal prosecutors were working behind the scenes within days of the spill to determine whether BP and the other companies involved should be charged with environmental crimes.<sup>114</sup>

On June 1, 2010, President Obama confirmed the existence of a criminal investigation of the Gulf oil spill and pledged that “[i]f our laws were bro-

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109. NATIONAL COMMISSION REPORT, *supra* note 36, at 127.

110. *Id.*

111. Press Release, U.S. Dep’t of the Interior, Salazar Swears-In Michael R. Bromwich to Lead Bureau of Ocean Energy Management, Regulation and Enforcement (June 21, 2010), available at <http://www.doi.gov/news/pressreleases/Salazar-Swears-In-Michael-R-Bromwich-to-Lead-Bureau-of-Ocean-Energy-Management-Regulation-and-Enforcement-Secretarial-Order-Begins-Reorganization-of-Former-MMS.cfm>; *Bureau of Ocean Energy Management, Regulation and Enforcement: MMS Gets A Name Change*, HUFFINGTON POST (June 29, 2010, 5:37 PM), [http://www.huffingtonpost.com/2010/06/29/bureau-of-ocean-energy-ma\\_n\\_629916.html](http://www.huffingtonpost.com/2010/06/29/bureau-of-ocean-energy-ma_n_629916.html).

112. See *supra* note 107 and accompanying text.

113. David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223, 1246 (2009). In this context, “significant harm” includes public health effects (serious injuries or deaths) and environmental harm (ecological impacts such as loss of wildlife or fish kills). Significant harm also could include evacuations or cleanups involving substantial expenditures.

114. See David M. Uhlmann, *Crimes on the Gulf*, LAW QUADRANGLE, Fall 2010, at 31 [hereinafter Uhlmann, *Crimes on the Gulf*]; David M. Uhlmann, Op-Ed., *Prosecuting Crimes Against the Earth*, N.Y. TIMES, June 4, 2010, at A27 [hereinafter Uhlmann, *Prosecuting Crimes Against the Earth*].



ken . . . we will bring those responsible to justice . . .”<sup>115</sup> Some of the president’s political opponents questioned whether there was any need to investigate. Texas Governor Rick Perry described the explosion as “an act of God.”<sup>116</sup> Tea Party activist and then-U.S. Senate candidate Rand Paul opined that we should avoid the blame game in the Gulf because “accidents happen.”<sup>117</sup> After BP agreed to establish a twenty-billion-dollar escrow fund for spill victims—which may become a restitution fund when criminal prosecution occurs—U.S. Representative Joe Barton apologized to BP for the “shakedown” at the hands of the president.<sup>118</sup>

Politics aside, it is hard to dispute the proposition that the government has an obligation to investigate the circumstances of an oil spill that took such a terrible toll on the environment and coastal residents, not to mention on the families of the workers who lost their lives on the *Deepwater Horizon*. The government needed to conduct an independent inquiry into the causes of the spill both to hold accountable those responsible for the spill and to prevent similar tragedies in the future. There is some risk that a criminal investigation will discourage cooperation by corporate employees, who may assert their Fifth Amendment rights against self-incrimination, as occurred during Coast Guard and MMS hearings regarding the Gulf oil spill.<sup>119</sup> As a practical matter, however, it is best to address potential criminal charges when the evidence is fresh, both because witness recollections are more accurate at that point and because a prompt investigation preserves evidence in the event criminal prosecution occurs.

The precedent for criminal prosecution in major oil spill cases was set during the administration of President George H.W. Bush when the Justice Department prosecuted Exxon Corporation and Exxon Shipping Company for the spill that marred Prince William Sound in 1989.<sup>120</sup> Several years later,

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115. See Brian Montopoli, *Obama Vows “Justice” For Oil Spill Crimes, Political Hotsheet*, CBS NEWS (June 1, 2010, 12:26 PM), [http://www.cbsnews.com/8301-503544\\_162-20006435-503544.html](http://www.cbsnews.com/8301-503544_162-20006435-503544.html).

116. Aman Batheja & Maria Recio, *Perry backs offshore drilling, says spill may be act of God*, FORT WORTH STAR-TELEGRAM, May 4, 2010, <http://www.star-telegram.com/2010/05/03/v-print/2160779/perry-backs-offshore-drilling.html>.

117. Kate Phillips, *After Explaining a Provocative Remark, Paul Makes Another*, N.Y. TIMES, May 22, 2010, at A10.

118. Stephanie Condon, *Joe Barton’s Apology Continues to Spark Uproar, Political Hotsheet*, CBS NEWS (June 18, 2010 10:22 AM), [http://www.cbsnews.com/8301-503544\\_162-20008143-503544.html](http://www.cbsnews.com/8301-503544_162-20008143-503544.html).

119. David Hammer, *Oil spill hearings: BP man on Deepwater Horizon rig refuses to testify, says he will take the Fifth*, TIMES-PICAYUNE (May 26, 2010, 6:34 PM), [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/oil\\_spill\\_hearings\\_bp\\_man\\_on\\_d.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/oil_spill_hearings_bp_man_on_d.html). MMS is now the Bureau of Ocean Energy Management, Regulation and Enforcement. See *supra* note 111 and accompanying text.

120. Exxon Corporation pleaded guilty to criminal violations of the Migratory Bird Treaty Act; Exxon Shipping Company pleaded guilty to criminal violations of the Clean Water Act, the Migratory Bird Treaty Act, and the Refuse Act. Exxon Shipping Co. and Exxon Corp., No. 90-CR-00015 (D. Alaska 1991); see also Press Release, Envtl. Prot. Agency, Exxon to Pay Record One Billion Dollars in Criminal Fines and Civil Damages in Connection with Alaskan Oil Spill (Mar. 13, 1991), available at <http://www.epa.gov/history/topics/valdez/02.htm>.

when a less heralded oil spill despoiled the coast of Puerto Rico during the Clinton administration, the Justice Department again brought criminal charges.<sup>121</sup> Prior to the Gulf oil spill, the two largest penalties ever imposed for environmental crime were the \$150 million fine imposed in the *Exxon Valdez* case<sup>122</sup> and the \$75 million fine imposed in the Puerto Rico oil spill case.<sup>123</sup> Because the Gulf oil spill involved far more oil, discharged over a longer period of time, and caused much greater economic damage to coastal communities, the argument for criminal prosecution of the Gulf oil spill is stronger than it was for either the *Exxon Valdez* or Puerto Rico oil spills.<sup>124</sup>

Although a number of statutes were likely violated in the Gulf oil spill, the Clean Water Act is the most significant from a pollution-prevention standpoint and in terms of understanding the role of criminal enforcement under the environmental laws.<sup>125</sup> The Clean Water Act prohibits any unpermitted discharge of oil into the exclusive economic zone of the United States or in connection with activities governed by the Outer Continental Shelf Lands Act “in such quantities as may be harmful as determined by the President.”<sup>126</sup> By regulation, the EPA and the Coast Guard have defined harmful quantities as discharges that cause a “sheen upon . . . the surface of the water or adjoining shorelines” or “sludge . . . beneath the

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121. See Press Release, Guillermo Gil, U.S. Attorney, Three Corporations Fined \$75 Million for Puerto Rico Oil Spill: Largest Federal Environmental Crime Fine in U.S. History (Sept. 25, 1996), available at <http://www.justice.gov/opa/pr/1996/Sept96/470enr.htm>.

122. *Exxon Shipping*, No. 90-CR-00015; see also Peter J. Henning, *Looking for Liability in BP's Gulf Oil Spill*, *DealBook*, N.Y. TIMES (June 7, 2010, 9:30 AM), <http://dealbook.blogs.nytimes.com/2010/06/07/looking-for-liability-in-bps-gulf-oil-spill/>. Exxon Shipping was sentenced to pay a fine of \$125 million and Exxon Corporation was sentenced to pay a fine of \$25 million, but \$125 million of the total fine amount was remitted as restitution. *Exxon Shipping*, No. 90-CR-00015.

123. Criminal Docket for Case No. 3:95-cr-00084-ADC at 2–4, *United States v. Rivera*, 942 F. Supp. 732 (D.P.R. 1996) (No. 95-084 (HL)). Three corporate defendants, Bunker Group Puerto Rico, Bunker Group, Inc., and New England Marine Services were sentenced to pay fines of twenty-five million dollars per corporation for their roles in the Puerto Rico oil spill. *Id.* The third largest penalty for environmental crime, prior to the Gulf oil spill, was the fifty million dollar fine imposed on BP after an explosion and fire killed fifteen workers at BP's troubled Texas City refinery in 2005. David Batty, *BP agrees to pay \$50m fine over Texas City deaths*, *GUARDIAN*, Aug. 13, 2010, at 22.

124. The Gulf oil spill involved the discharge of twenty times more oil than the *Exxon Valdez* oil spill, in which eleven million gallons of oil were discharged. See Chang, *supra* note 6. The Gulf oil spill caused more economic damage because it affected the economy of an entire region. *Id.*

125. The Migratory Bird Treaty Act, the Marine Mammal Protection Act, and the Endangered Species Act were also violated in the Gulf oil spill, but their prohibitions involve harm to wildlife, not discharge of oil. See *supra* notes 20–26. Likewise, the Seaman's Manslaughter Act was violated if the worker deaths resulted from negligence, willful misconduct, or inattention to duties, but the statute applies to the worker deaths, not the spill itself. See *id.* The Outer Continental Shelf Lands Act governs drilling activities in the Gulf and therefore implicates whether the drilling was conducted in a lawful manner. See *id.* Title 18 provisions regarding false statements and obstruction of justice focus on interaction with regulators, and potential Title 18 fraud charges involve securities regulation. See *id.*

126. Clean Water Act § 311(b)(3), 33 U.S.C. § 1321(b)(3) (2006). See also discussion *infra* Section IV.B.

surface of the water or upon adjoining shorelines.”<sup>127</sup> If a prohibited discharge occurs knowingly, which means that the defendant acted intentionally and not as a result of mistake or accident, a felony violation of the Clean Water Act occurs.<sup>128</sup> If a prohibited discharge results from the defendant’s negligence, a misdemeanor violation of the Clean Water Act occurs.<sup>129</sup>

The Justice Department typically charges knowing violations of the Clean Water Act, as opposed to negligent violations, because it prefers to focus its limited criminal enforcement resources on the charges that Congress has deemed the most serious by making them felonies.<sup>130</sup> The problem with this approach in the context of the Gulf oil spill is that none of the companies involved intended to discharge oil into the Gulf. I have suggested elsewhere that the government might argue that the discharges in the Gulf oil spill occurred knowingly, because BP and its partners took so many risks and deviated so much from industry practice that they knew a discharge might occur.<sup>131</sup> There is at least some evidence to support this view; one Transocean employee who expressed concern about the drilling procedures stated, “I guess that’s what we have those pinchers [the device on the blowout preventer] for” after his concerns went unaddressed.<sup>132</sup> Awareness that a blowout (and subsequent discharge) might occur, however, is closer to

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127. 40 C.F.R. § 110.3 (2010). The regulatory standard of causing a sheen on the surface of the water or sludge below the surface of the water sets a relatively de minimis standard for harmful discharge quantities in oil spill cases, which easily is met here.

128. See 33 U.S.C. § 1319(c)(2). A knowing violation of the Clean Water Act requires proof that the defendant knew about the discharge but does not require proof that the defendant knew the discharge was unlawful. *United States v. Weitzenhoff*, 35 F.3d 1275, 1283–86 (9th Cir. 1993); *United States v. Sinskey*, 119 F.3d 712, 715–19 (8th Cir. 1997). In the oil spill context, a knowing violation would require proof that the defendant knew that a spill would occur but not that the discharge required permits.

129. *Id.* § 1319(c)(1). To prove a negligent violation, the government would need to show that the discharge occurred because the defendant failed to exercise reasonable care. *United States v. Ortiz*, 427 F.3d 1278, 1283 (10th Cir. 2005); *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999).

130. See David M. Uhlmann, *Prosecuting Worker Endangerment: The Need for Stronger Criminal Penalties for Violations of the Occupational Safety and Health Act*, ADVANCE: J. ACS ISSUE GROUPS, Spring 2009, at 191, 198–99.

131. Uhlmann, *Crimes on the Gulf*, *supra* note 114; Uhlmann, *Prosecuting Crimes Against the Earth*, *supra* note 114.

132. MSNBC.com News Servs., *Worker: Transocean, BP argued before blast*, MSNBC.COM (May 26, 2010, 7:23 PM), <http://www.msnbc.msn.com/id/37363106/ns/39428558>.

recklessness than intentional conduct,<sup>133</sup> and recklessness is not a proxy for knowledge under the Clean Water Act.<sup>134</sup>

It will be far easier to find negligence in the events leading to the Gulf oil spill, particularly with regard to BP's conduct. As discussed in Part I above, BP chose a single-tube well design that, while used safely in the past and approved by MMS, provided fewer barriers to contain gas within the well than other well designs. BP decided to use a single cement plug and fewer centralizers than Halliburton recommended. BP cancelled a bond cement test that might have revealed problems with the cement seal. These problems were compounded by other errors, including the failure to circulate drilling mud adequately, which helps the cement cure; the replacement of drilling mud with seawater, which made it easier for gas to escape; and the misreading of pressure tests conducted hours before the blowout, which should have revealed the instability of the cement seal.<sup>135</sup>

BP has all but acknowledged its negligence—and has inculcated Transocean and Halliburton—in its internal investigation of the factors that caused the Gulf oil spill.<sup>136</sup> BP's admissions will make it easier for the Justice Department to prove negligence, although prosecutors may struggle to identify a single negligent act or omission that caused the blowout.<sup>137</sup> Many of the decisions that led to the blowout may be defensible when viewed in isolation; it appears that the spill occurred more because of a combination of missteps by the companies than because of a single, fateful, poor decision.<sup>138</sup> Yet such an aggregate theory of negligence would be consistent with principles of corporate criminal liability, which attribute all acts committed by corporate employees or agents, within the scope of their employment or

133. "Recklessness" is a higher mens rea state than ordinary negligence. Recklessness occurs when a defendant "consciously disregards a substantial and unjustifiable risk that . . . will result from his conduct." MODEL PENAL CODE § 2.02(2)(c) (1962); see also BLACK'S LAW DICTIONARY 1385 (9th ed. 2009) (defining recklessness as "[c]onduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk . . . . Recklessness involves a greater degree of fault than negligence but a lesser degree of fault than intentional wrongdoing").

134. In contrast, willful blindness—which occurs when someone takes affirmative steps to shield herself from facts that otherwise would be obvious—can substitute for knowledge. See, e.g., *United States v. Hopkins*, 53 F.3d 533, 541–42 (2d Cir. 1995) (defendant could not escape liability if he "deliberately and consciously avoided" knowledge of the violation).

135. See *supra* notes 44–70 and accompanying text; see also Steven Mufson, *Experts, rivals blast BP's practices*, WASH. POST, Nov. 10, 2010, at A04; David Hammer, *5 key human errors, colossal mechanical failure led to fatal Gulf oil rig blowout*, TIMES-PICATUNE (Sept. 5, 2010, 6:00 AM), [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/09/5\\_key\\_human\\_errors\\_colossal\\_me.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/09/5_key_human_errors_colossal_me.html).

136. See INCIDENT INVESTIGATION TEAM, *supra* note 92; see also Dina Cappiello et al., *BP report blames itself, others for oil spill*, NBC26, Sept. 8, 2010, <http://www.nbc26.com/Global/story.asp?S=13115835&clintype=printable>.

137. As the presidential commission noted, "irreducible uncertainty may persist regarding the precise contribution to the blowout of each of several potentially immediate causes . . ." NATIONAL COMMISSION REPORT, *supra* note 36, at 122. Of course, prosecutors may develop better evidence since, unlike the presidential commission, they can use the subpoena power of the grand jury.

138. The presidential commission appears to have reached a similar conclusion by focusing on the failure of industry management. See *id.*

agency, to the corporation.<sup>139</sup> In addition, negligence is notoriously easy to prove under the Clean Water Act, because courts have only required prosecutors to show ordinary negligence—the same failure to use reasonable care that applies in tort cases—in criminal prosecutions under the Clean Water Act.<sup>140</sup>

BP could challenge the government's position that ordinary negligence is sufficient to impose criminal liability under the Clean Water Act, since decisions by two federal courts of appeals<sup>141</sup> do not constitute overwhelming authority. Moreover, the United States Court of Appeals for the Fifth Circuit, where appeals in the Gulf oil spill case would be heard, has been skeptical about the government's interpretation of the Clean Water Act in other contexts.<sup>142</sup> Yet BP seems unlikely to litigate the Gulf oil spill case, particularly if it is only required to admit ordinary negligence as part of a guilty plea. BP will be anxious to put the oil spill behind it as quickly as possible in a way that preserves its ability to conduct drilling in the Gulf and maintains its long-term viability as a company.

As a result, BP is likely to pursue a global settlement that resolves both criminal and civil penalties for the Gulf oil spill (along with restitution and natural resource damage claims). A settlement would allow BP to remove uncertainty about its financial liabilities for the spill. BP could negotiate a payment schedule that would make even multi-billion-dollar fines manageable. Conversely, litigating would come at an enormous cost for BP. In addition to continued uncertainty about its financial obligations, BP would squander the credit it would receive in plea negotiations for spearheading cleanup efforts and accepting responsibility for its role in the tragedy. BP would be unlikely to prevail at trial and would instead relive the nightmare of the oil spill in a United States courthouse during 2012 or 2013.<sup>143</sup>

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139. See *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494 (1909); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1005 (9th Cir. 1972); cf. *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987) (upholding the “collective knowledge” doctrine, which attributes to a corporation the knowledge of all its employees and agents).

140. See *United States v. Ortiz*, 427 F.3d 1278, 1283 (10th Cir. 2005) (stating that a person “violates the [Clean Water Act] by failing to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstances, and, in so doing, discharges any pollutant into United States waters [in violation of the Act]”); *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999) (“Congress intended that a person who acts with ordinary negligence in violating 33 U.S.C. § 1321(b)(3) may be subject to criminal penalties.”).

141. See *Ortiz*, 427 F.3d 1278 (Tenth Circuit); *Hanousek*, 176 F.3d 1116 (Ninth Circuit). In this regard, it should be noted that the Supreme Court denied certiorari in *Hanousek* over the dissent of Justices Thomas and O’Connor. *Hanousek v. United States*, 528 U.S. 1102 (2000) (denying certiorari). It is uncertain whether the same result would occur today given the changes in the Court’s membership.

142. See *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003) (rejecting government arguments about the scope of federal jurisdiction under the Clean Water Act); *United States v. Ahmad*, 101 F.3d 386, 390–91 (5th Cir. 1996) (rejecting government arguments about knowledge requirements in a criminal prosecution under the Clean Water Act and government claims that violation of the Clean Water Act is a public welfare offense).

143. An alternative for BP would be to challenge the governing legal standard in pretrial motions under Rule 12(b)(2) of the Federal Rules of Criminal Procedure. See generally James Fal-lows Tierney, Comment, *Summary Dismissals*, 77 U. CHI. L. REV. 1841 (2010). If the court requires

Transocean and Halliburton might have more incentives to challenge the government's interpretation of the Clean Water Act's negligence provisions and to contest their criminal responsibility for the Gulf oil spill. They will argue that they protested BP's efforts to deviate from industry norms. For example, Transocean disagreed with BP about how to remove drilling mud and replace it with seawater.<sup>144</sup> Halliburton wanted to use more centralizer rods but was overruled by BP.<sup>145</sup> Moreover, Transocean and Halliburton will claim that criminal charges against them would overlook the reality of how drilling is conducted. The well owners, not the rig operators and contractors, have the final say in all drilling matters.<sup>146</sup>

Ultimately, the fact that Transocean and Halliburton raised concerns about the well closure procedures may mitigate their responsibility, in terms of the exercise of prosecutorial discretion, but does not exculpate them from criminal liability. Mitigation is appropriate because Transocean and Halliburton objected when BP deviated from industry norms and thus demonstrated greater concern for safe practices. But the concerns they raised also demonstrate that Transocean and Halliburton knew there was a risk of a blowout and possible spill. Whether they were reluctant participants in negligent conduct does not create a defense to claims that their conduct was also negligent. Both companies acceded to BP's requests and are accountable for doing so. Indeed, the government will use the Gulf oil spill case to establish precedent that drilling companies and their contractors have safety and environmental obligations and cannot shirk those responsibilities out of fealty to the demands of the well owner.<sup>147</sup>

The ability to charge negligence under the Clean Water Act—and seek record criminal fines against BP, Transocean, and Halliburton—essentially decides the question whether there will be criminal charges for the Gulf oil spill.<sup>148</sup> The same factors that compel an investigation—the deaths, the size

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a heightened showing of negligence, the government would need to obtain a new indictment and would face a more difficult evidentiary burden at trial. If the court follows *Hanousek* and *Ortiz* and requires only ordinary negligence, BP could still plead guilty, although it would not receive as much credit for cooperation during plea negotiations with the government.

144. Miguel Bustillo, *Big Spat on Rig Preceded Explosion*, WALL ST. J., May 25, 2010, at A7.

145. Robbie Brown, *Adviser Says He Raised Concerns to BP on Well*, N.Y. TIMES, Aug. 25, 2010, at A13.

146. See Ed Crooks, *BP's role in Deepwater Horizon drilling highlighted by contractors*, FIN. TIMES Energy Source Blog (May 11, 2010, 1:48 PM), <http://blogs.ft.com/energy-source/2010/05/11/bps-role-in-deepwater-horizon-drilling-highlighted-by-contractors/>. An exception occurs when the rig operator feels that the safety of the vessel would be compromised by actions demanded by the well owner.

147. See *infra* notes 203–211 and accompanying text.

148. As a matter of prosecutorial discretion, the Justice Department usually does not charge criminal violations of strict liability statutes such as the Migratory Bird Treaty Act (and the Refuse Act) unless there is negligence, which reflects the view that criminal prosecution should be reserved for cases where there is at least some evidence of wrongdoing. Uhlmann, *Crimes on the Gulf*, *supra* note 114, at 31. Given the evidence of negligence in the Gulf oil spill, however, the government is likely to charge Migratory Bird Treaty Act violations, proof of which will require the government to show only that the defendants' actions led to the taking of a migratory bird—a strict liability stan-

of the spill, the ecological destruction, and the economic losses—will convince the Justice Department to prosecute once it concludes that there is sufficient evidence to prove negligence beyond a reasonable doubt. Stated differently, the Justice Department cannot fail to use the primary criminal enforcement authority provided by Congress for oil spill cases when confronted with the worst accidental oil spill in history.

The fact that the Justice Department has already filed a civil suit based on the Gulf oil spill does not diminish the likelihood of a criminal case. In most cases, the Justice Department chooses between criminal and civil enforcement after weighing the seriousness “of the violation, the complexity of the underlying law, and the exercise of prosecutorial discretion.”<sup>149</sup> Electing remedies allows the government to use its resources more efficiently and reflects the view that deterrence does not require a defendant to face criminal and civil sanctions for the same conduct. However, the Justice Department has a long-standing policy of seeking criminal and civil penalties in what it views as the most egregious cases, and the Gulf oil spill meets that test.<sup>150</sup>

Moreover, BP has a history of criminal violations, which will influence how prosecutors exercise their discretion. In 1999, BP pleaded guilty to failing to report the release of hazardous substances into the environment at an oil field in Alaska.<sup>151</sup> In 2007, BP pleaded guilty to failing to maintain a safe workplace in violation of the Clean Air Act after fifteen workers died during an explosion at its Texas City refinery.<sup>152</sup> BP also pleaded guilty in 2007 to Clean Water Act violations after corroded pipelines caused an oil spill in Alaska’s Prudhoe Bay.<sup>153</sup> Though BP will argue that those convictions involved different BP subsidiaries, they nonetheless raise questions about BP’s overall commitment to safe operations.<sup>154</sup> The Justice Department has identified a corporation’s past history, including the history of related corporate

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dard. With thousands, if not millions, of birds coated in oil, evidence to support such strict liability violations is readily available.

149. *Id.* at 32.

150. *Id.*

151. See *United States v. BP Exploration (Alaska), Inc.*, No. A99-0141CR(JKS) (D. Alaska 1999) (criminal violations of CERCLA, 42 U.S.C. § 9601 *et seq.*). BP acknowledged in the plea agreement that it had provided “inadequate oversight and supervision” of environmental, health, and safety requirements and agreed to implement a national environmental compliance program at BP facilities, including its deepwater drilling operations in the Gulf of Mexico. *Id.*

152. *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655, 660 (S.D. Tex. 2009). Investigators concluded that BP had failed to follow its own safety procedures. *Id.* at 664–65.

153. Press Release, Nelson P. Cohen, U.S. Attorney, Dist. of Alaska, British Petroleum Exploration (Alaska) Agrees to Plead Guilty to a Criminal Violation of the Clean Water Act and Pay \$20 Million in Criminal Penalties (Oct. 25, 2007), available at [http://www.justice.gov/usao/ak/press/October%202007/BPXA\\_071025.pdf](http://www.justice.gov/usao/ak/press/October%202007/BPXA_071025.pdf).

154. “Since 2007, according to analysis by the Center for Public Integrity, BP has received 760 citations for ‘egregious and willful’ safety violations—those ‘committed with plain indifference to or intentional disregard for employee safety and health.’” Dickinson, *supra* note 51, at 59–60. During the same time period, the rest of the oil industry received only one citation. See *id.* at 60.

entities, as one of the factors that prosecutors must consider in the exercise of prosecutorial discretion.<sup>155</sup>

Transocean does not have a criminal history, and, as noted above, its employees initially raised objections to many of the decisions that led to the Gulf oil spill.<sup>156</sup> As the presidential commission emphasized, however, Transocean did experience a similar incident on one of its North Sea rigs that should have prompted it to be more vigilant.<sup>157</sup> Transocean fared poorly in safety audits that it commissioned prior to the *Deepwater Horizon* tragedy,<sup>158</sup> and it failed to conduct required inspections of the blowout preventer, which was equipped with only one shearing ram (two shearing rams, although not required, provide better protection).<sup>159</sup> Perhaps most significantly, Transocean employees carried out most of the questionable decisions made by BP. Because Transocean was involved in so much of the conduct that caused the spill, and because it was responsible for safe operation of the *Deepwater Horizon* and maintenance of the faulty blowout preventer, it is all but certain that Transocean will face criminal charges as well.

Halliburton initially appeared to be in a good position to argue that it should not be criminally prosecuted for its role in the Gulf oil spill. Halliburton had none of the authority that BP possessed to make decisions about well design and drilling protocols. Halliburton was not the drilling company and therefore, unlike Transocean, did not have extensive involvement in carrying out BP's decisions. Attorneys for Halliburton will argue that its role was so limited—and its actions proscribed to such a great extent by BP—that it should not be charged. On the other hand, the failure of the cement seal was one of the primary causes of the blowout. Halliburton acceded to BP's questionable decisions regarding the centralizer rods and failed to address test results indicating that its cement was unstable.<sup>160</sup> It also will not help Halliburton that it was under scrutiny in earlier high-profile cases but avoided criminal prosecution.<sup>161</sup> It therefore is increasingly likely that Halliburton will face criminal charges for the Gulf oil spill.

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155. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, tit. 9, ch. 28.600 (2008). While the history of related companies is relevant to the exercise of prosecutorial discretion, it is unlikely that evidence of prior violations by other BP subsidiaries would be admissible in a trial involving BP Exploration and Production. If such evidence were admissible, it could not be used to show that BP Exploration and Production acted in conformity with the past misconduct of other BP entities. Evidence of prior bad acts could only be used "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b).

156. See *supra* notes 130, 142 and accompanying text.

157. NATIONAL COMMISSION REPORT, *supra* note 36, at 124.

158. See *Gulf of Mexico Oil Spill (2010)*, *supra* note 81.

159. *Id.*; see also David Barstow et al., *Regulators Failed to Address Risks in Oil Rig Fail-Safe Device*, N.Y. TIMES, June 20, 2010, at A1 (noting unfortunate "decision years before to outfit the Deepwater Horizon's blowout preventer with just one blind shear ram when other rigs were already beginning to use two").

160. See *supra* notes 50–54 and accompanying text.

161. See, e.g., James Glanz, *Report Adds to Criticism of Halliburton's Iraq Role*, N.Y. TIMES, March 29, 2006, at A8 (discussing two of Halliburton's controversial Iraqi oil contracts).



In sum, criminal prosecution of the Gulf oil spill will occur because there is ample evidence to prove negligence, because the spill involved prohibited discharges of oil in unprecedented amounts, and because the spill resulted in extensive environmental harm and economic damage. Although it is doubtful that the government can pursue felony charges under the Clean Water Act, the negligence standard does not set a high bar for criminal prosecution, which increases the likelihood that BP, Transocean, and Halliburton will face criminal charges.<sup>162</sup>

### III. PARADIGMS LOST: THE GULF OIL SPILL AND ENVIRONMENTAL CRIMINAL ENFORCEMENT NORMS

The Gulf spill is one of the epic environmental events in our nation's history, along with the Cuyahoga River fire and the Santa Barbara oil spill in the 1960s, Love Canal and Times Beach in the 1970s, and the *Exxon Valdez* oil spill in the 1980s.<sup>163</sup> A major distinction between the Gulf oil spill and earlier environmental catastrophes is that only the *Exxon Valdez* oil spill resulted in a criminal case; the other incidents occurred before our modern environmental statutes were enacted, so the conduct involved was not illegal.<sup>164</sup> Moreover, while the *Exxon* spill resulted in a criminal prosecution, the case arose during the early years of the environmental crimes program—just two years after the Justice Department created its Environmental Crimes Section.<sup>165</sup> Today, the environmental crimes program is much more established,<sup>166</sup> which means that prosecutors have a better sense of how to exercise their discretion to determine which violations warrant prosecution.

Another major difference between previous environmental tragedies and the Gulf oil spill is the explosion of information sources that has occurred

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162. Criminal investigators will also review the conduct of Anadarko and Mitsui, the minority owners of the Macondo well. It does not appear, however, that either company was involved in decisions about how to conduct the drilling or was involved in the operation of the well. Absent evidence to the contrary, Anadarko and Mitsui will not be prosecuted criminally, although they are defendants in the Justice Department's civil suit and will face civil penalties under the Clean Water Act § 311, 33 U.S.C. § 1321 (2006), and liability as a responsible party under the Oil Pollution Act, 33 U.S.C. §§ 2701–2704.

163. It is unlikely the Gulf oil spill will have a similar galvanizing effect on environmental law. The Clean Water Act Amendments of 1972 were in major part a response to the Cuyahoga River and Santa Barbara incidents; the tragedies of Love Canal and Times Beach helped spur the Superfund law (i.e., CERCLA) in 1980; and the *Exxon Valdez* brought the Oil Pollution Act of 1990 (and with it enhanced civil penalties of \$1,100 to \$4,300 per barrel for oil spill cases). The House of Representatives passed legislation in response to the Gulf oil spill in July 2010, but the Senate never took action on the bill, and its prospects are dim. For a discussion of the roles of the Cuyahoga River, the Santa Barbara oil spill, and Love Canal in the modern environmental law movement, see Richard J. Lazarus, *THE MAKING OF ENVIRONMENTAL LAW* (2004).

164. See generally Uhlmann, *supra* note 113, at 1224, 1228.

165. In 1982, the Justice Department established an Environmental Crimes Unit in the Environmental Enforcement Section of the Lands and Natural Resources Division. ENV'T & NATURAL RES. DIV., U.S. DEP'T OF JUSTICE, *PUBLIC LANDS AND NATURAL TREASURES: THE FIRST 100 YEARS OF THE ENVIRONMENT & NATURAL RESOURCES DIVISION 1909–2009*, at 57–58 (2009). In 1987, the Environmental Crimes Unit became the Environmental Crimes Section. *Id.*

166. See David M. Uhlmann, *Strange Bedfellows*, ENVTL. F., May/June 2008, at 40, 44.

over the last twenty years. Never before has so much of the general public been exposed over such a long period of time to so many news stories, photographs, and videos of an environmental tragedy in newspapers, on television, and over the internet. Photographs of wildlife coated in oil are indelible memories from the *Exxon Valdez* spill, but images of oil gushing from the floor of the Gulf and cleanup crews on coastal beaches are part of the public lore in ways that were not possible even as recently as 1989.

The Gulf oil spill will be the most significant environmental case ever prosecuted and easily the most renowned. It involves one of the worst environmental disasters in our history, it was witnessed by millions, and it will produce record penalties. In cases of corporate crime, the significance of the case is often measured by the size of the penalties.<sup>167</sup> Using that metric, no prior environmental case will be in the same category as the Gulf oil spill. A criminal fine of even one billion dollars would be seven times larger than the fine imposed in the *Exxon Valdez* case.<sup>168</sup> A relatively modest penalty of three billion dollars—modest because BP already has agreed to set aside twenty billion dollars to cover anticipated economic losses and natural resource damages from the spill<sup>169</sup>—would be twenty times larger than the *Exxon Valdez* sentence and more than two times larger than the prior record for all corporate crimes.<sup>170</sup>

Yet a multi-billion-dollar criminal fine for BP is likely. Under the Alternative Fines Act,<sup>171</sup> a provision of federal sentencing law that applies to all federal crimes but is not widely known outside the Justice Department and the corporate defense bar, the maximum criminal penalty will be twice the losses associated with the Gulf oil spill.<sup>172</sup> The Alternative Fines Act does

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167. See Russell Mokhiber, *Top 100 Corporate Criminals of the Decade*, CORPORATE CRIME REPORTER, <http://www.corporatecrimereporter.com/top100.html> (last visited Mar. 4, 2011).

168. See *supra* note 122 and accompanying text.

169. See Ian Urbina, *BP Settlements Likely to Shield Top Defendants*, N.Y. TIMES, Aug. 20, 2010, at A1.

170. As noted above, the largest fine for corporate crime in the United States was \$1.3 billion, which Pfizer paid in 2009. See Harris, *supra* note 29.

171. Alternative Fines Act, 18 U.S.C. § 3571 (2006).

172. Under federal sentencing law, the maximum sentence for organizational defendants is the greater of (1) the amount set forth in the statute of conviction; (2) \$500,000 per felony count or \$200,000 per misdemeanor count; or (3) twice the loss or gain associated with the offense. See *id.* The maximum criminal penalty under the Clean Water Act is \$50,000 per day for a felony violation, Clean Water Act § 309(c)(2), 33 U.S.C. § 1319(c)(2) (2006), and \$25,000 per day for a misdemeanor violation, 33 U.S.C. § 1319(c)(1). For a spill that lasted 100 days, the per diem fines under the Clean Water Act provide a maximum penalty of \$5 million for felony violations and \$2.5 million for misdemeanor violations, far less than twice the losses associated with the oil spill. Likewise, if each day of the 100-day oil spill were charged separately, the maximum fine based on the per count amounts provided by federal sentencing law would be \$50 million for felony violations and \$20 million for misdemeanor violations—still far less than the multi-billion-dollar fine authorized under the loss doubling provisions of the Alternative Fines Act. Compare 18 U.S.C. § 3571(c)(3) (setting maximum fine of \$500,000 for an organizational defendant convicted of a felony violation), *id.* § 3571(c)(4) (setting maximum fine of \$500,000 for an organizational defendant convicted of a misdemeanor violation resulting in death), and *id.* § 3571(c)(5) (setting a maximum fine of \$250,000 for an organizational defendant convicted of a Class A misdemeanor), with *id.* § 3571(d)

not define what constitutes “losses associated with the offense,” but it would be appropriate to include at least all economic losses and natural resource damages from the spill, since the unpermitted discharge of oil is the offense prohibited by the Clean Water Act. Although the full extent of economic losses and natural resource damages may not be known for years, the maximum criminal penalty would be forty billion dollars if the twenty billion dollars that BP agreed to place in escrow to pay damages from the spill proves to be an accurate estimate. BP would negotiate for a lower figure, but a criminal fine that is not in the billions of dollars would be out of proportion with the damage wrought by BP’s crimes.<sup>173</sup>

The Gulf oil spill will therefore have a significant role in shaping societal perceptions of environmental crime. For most Americans, the Gulf oil spill—bookended by the *Exxon Valdez* oil spill twenty-one years earlier—will become the classic example of environmental crime. To be sure, there are ways the Gulf oil spill is typical of environmental crime. The fact that it involves corporations is beyond paradigmatic; the overwhelming majority of environmental crimes—at least where violations of the antipollution laws are concerned—are committed by corporations. Not all of those corporations are among the top ten of the Global Fortune 500 companies,<sup>174</sup> but the Justice Department has regularly prosecuted major corporations for environmental crime, including Exxon,<sup>175</sup> Rockwell,<sup>176</sup> International Paper,<sup>177</sup> Royal Caribbean,<sup>178</sup> Koch Petroleum,<sup>179</sup> Tyson Foods,<sup>180</sup> W.R. Grace,<sup>181</sup> and Citgo.<sup>182</sup>

Environmental crimes are usually committed by companies that do not place sufficient emphasis on environmental compliance, and the Gulf oil spill is no exception. For years, BP stressed production and efficiency over safety and failed to address systemic problems in its environmental compliance programs even after criminal (and civil) violations occurred at BP

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(setting maximum fine of twice the gross pecuniary gain or gross pecuniary loss associated with an offense).

173. A multi-billion-dollar criminal fine will be just one component of BP’s sentence. The sentence is also likely to include restitution and community service projects that will supplement the natural resource damage claims paid in the civil suit. As a result, the total criminal sentence—a combination of fines, restitution, and restoration projects—may reach into the tens of billions of dollars. See *infra* notes 239–240 and accompanying text.

174. BP was the fourth-largest company in the world during 2010, according to *Fortune Magazine*. See *Fortune Global 500: World’s Largest Corporations 1–100*, FORTUNE, July 26, 2010, at F-1, available at <http://money.cnn.com/magazines/fortune/global500/2010/>.

175. Exxon Shipping Co. and Exxon Corp., No. 90-CR-00015 (D. Alaska 1991).

176. Rockwell Int’l Corp., No. 1:92-CR-00107, (D. Colo. 1992).

177. Int’l Paper Co., No. 1:91-CR-00051, (D. Me. 1991).

178. United States v. Royal Caribbean Cruises Ltd., 11 F. Supp. 2d 1358 (S.D. Fla. 1998).

179. Koch Petroleum Group, LP, No. 2:00-CR-00325 (S.D. Tex. 2001).

180. Tyson Foods, Inc., No. 03-CR-00203 (W.D. Mo. 2003).

181. W.R. Grace & Co., No. 05-CR-0007 (D. Mont. 2009) (acquittal).

182. Citgo Petroleum Corp., No. 2:06-CR-00563 (S.D. Tex.) (not yet sentenced).

facilities.<sup>183</sup> As discussed in Part II, the presidential commission concluded that the root causes of the Gulf oil spill were management failures at BP, Transocean, and Halliburton that led to poor risk assessment, missed warning signals, and flawed decision making that collectively led to tragedy.<sup>184</sup>

Second, the Gulf oil spill will resemble other environmental crimes if the charges include criminal violations of the Outer Continental Shelf Lands Act. If BP and the other companies involved in the spill committed criminal violations of federal drilling laws, the case will be more like a classic environmental crime because it would involve the flouting of rules enacted to protect our environment from harmful activities. The civil lawsuit filed by the Justice Department in December 2010 alleges numerous violations of drilling laws, including failure to take precautions to maintain well control, failure to use the best available and safest drilling technology, and failure to maintain equipment and materials such as the blowout preventer.<sup>185</sup> If those violations occurred knowingly and willfully, they could be charged as criminal violations of the Outer Continental Shelf Lands Act.<sup>186</sup>

As discussed in Part I, however, much of the conduct that was at the heart of the alleged negligence—for example, the well design, the use of a blowout preventer with a single shearing ram, and the depth of the cement plug—occurred with the knowledge and approval of MMS.<sup>187</sup> The acquiescence of regulatory officials does not mean that there were no violations; regulators have neither the ability to impose requirements that do not exist nor the ability to authorize conduct that is contrary to statutory or regulatory requirements. Moreover, significant concerns have been raised about whether MMS regulators had improper relationships with the companies that they were supposed to regulate.<sup>188</sup> Nonetheless, unless the companies involved in

183. See Press Release, Nat'l Comm'n on the BP Deepwater Horizon Oil Spill & Offshore Drilling, Co-Chairman Bob Graham's Opening Statement from Nov. 9 Hearing (Nov. 9, 2010) ("The problem here is that there was a culture that did not promote safety and that culture failed."); Press Release, Nat'l Comm'n on the BP Deepwater Horizon Oil Spill & Offshore Drilling, Co-Chairman William K. Reilly's Opening Statement from Nov. 9 Hearing (Nov. 9, 2010) ("BP has been notoriously challenged on matters of process safety."). See generally NAT'L ACADS., *supra* note 50. BP has a long history of a troubled corporate culture. Confidential investigations into BP's Alaskan oil operations identified instances in which management tolerated aging equipment of questionable safety, induced employees not to report problems, and shortened or put off inspections to cut production costs. Abraham Lustgarten & Ryan Knutson, *Reports at BP over years find history of problems*, WASH. POST, June 8, 2010, at A01. A 2001 report revealed that BP had neglected emergency shutdown equipment, including valves and detectors like those that could have thwarted the *Deepwater Horizon* accident. *Id.* Another report, from 2004, found that potential whistleblowers were being systematically intimidated. The 200,000-gallon Prudhoe Bay pipeline spill of 2006—the largest ever on Alaska's North Slope—occurred under this troubled culture. During the same period, similar problems surfaced at BP facilities in California and Texas. *Id.*

184. See *supra* notes 99–100 and accompanying text.

185. Complaint of the United States of America at ¶¶ 47–56, *United States v. BP Exploration & Prod. Inc.*, 2:10-cv-04536-CJB-SS (E.D. La. Dec. 15, 2010) (alleging violations of 30 C.F.R. § 250).

186. Outer Continental Shelf Lands Act § 24(c), 43 U.S.C. § 1350(c) (2006).

187. See *supra* notes 109–110 and accompanying text.

188. Dickinson, *supra* note 51, at 56.

the Gulf oil spill misled or colluded with regulators, the involvement of MMS officials makes it difficult to claim that BP, Transocean, and Halliburton knowingly and willfully violated federal drilling laws. A willful violation requires proof that the defendant acted with knowledge that its conduct was unlawful,<sup>189</sup> which would be difficult to show if the governing regulatory agency approved the unlawful conduct.

A third way that the Gulf oil spill could resemble a typical environmental case is if the charges include false statements, fraud, or obstruction of justice in violation of Title 18 of the United States Code.<sup>190</sup> The criminal investigation of the Gulf oil spill includes the question whether BP, Transocean, and Halliburton were truthful in their communications with the government in the months and weeks before the spill occurred, as well as during the days and weeks after the spill began. If any of the companies lied to the government or concealed material facts from regulators, false statements and obstruction of justice charges could be brought against the companies and any individuals who engaged in misleading conduct. The government must be able to prove that the conduct was intentional—for example, a mistaken belief that the well was discharging 5,000 barrels of oil per day when in fact it was discharging 35,000 barrels of oil would not be a false statement or obstruction of justice. On the other hand, if corporate officials obtained regulatory approvals by withholding information about conditions at the well or if they deliberately underreported the amount of oil gushing from the well, false statement and obstruction of justice charges could be pursued. Inclusion of charges involving “lying, cheating, and stealing” would make the Gulf oil spill case similar to other corporate prosecutions of regulatory crime.<sup>191</sup>

Yet in myriad other ways the Gulf oil spill is an aberrational environmental crime, with conduct that was not as egregious, harm that was far worse, and penalties that bear no relation to norms for environmental crime. The Justice Department, armed with criminal investigators, grand jury authority, and subpoena power, could uncover deliberate regulatory violations or false statements and obstruction of justice. Absent such evidence, however, the Gulf oil spill case is a negligence case that is criminal because the negligence caused breathtaking harm, not because negligence is usually criminal under the environmental laws.

Under the environmental laws, negligence is only criminal under the Clean Water Act and a seldom-used provision of the Clean Air Act that makes it a misdemeanor to negligently release a hazardous air pollutant and thereby negligently place another person in imminent danger of death and

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189. *Bryan v. United States*, 524 U.S. 184, 193 (1998).

190. Uhlmann, *supra* note 113, at 1248–49.

191. See generally STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME (2006). In addition, news reports have indicated that the Criminal Division of the Justice Department is investigating whether corporate officials understated the amount of oil spilled in an effort to bolster stock prices or engaged in insider trading. See, e.g., Hammer, *supra* note 26. If fraud charges result, the case would be more typical of corporate crime cases generally.

serious bodily injury.<sup>192</sup> In all other respects, the major environmental statutes only impose criminal liability for knowing or intentional conduct. For example, under the federal hazardous waste laws, it is a crime to knowingly treat, store, or dispose of hazardous waste without a permit or in violation of permit conditions; negligent treatment, storage, or disposal of hazardous waste without a permit or in violation of permit conditions is not a crime.<sup>193</sup> Under the Clean Air Act, it is a crime to knowingly violate any of the Act's requirements regarding air pollution; negligent violations of the restrictions imposed by the Act are not crimes.<sup>194</sup> It is a crime under all of the environmental statutes to knowingly make false statements in permit applications or in required reports or to knowingly fail to maintain required records; negligent conduct in the same context is not criminal.<sup>195</sup>

Moreover, when negligence is charged under the Clean Water Act, it often involves intentional conduct where there is an issue about whether the defendant had all of the knowledge required under the Clean Water Act. In *United States v. Ortiz*, one of the two appellate court decisions that analyzed the standard of proof required to show negligence under the Clean Water Act, the defendant had dumped industrial waste into a toilet.<sup>196</sup> There was no question about his intent to dispose of the waste, but he claimed that he thought the toilet was not connected to the sewer system. Since a knowing violation of the Clean Water Act's pretreatment rules regarding discharges into the sewer system requires showing that the defendant knew his discharges had entered the sewer system, the United States only charged Mr. Ortiz with negligence, even though he had disposed of his waste intentionally.<sup>197</sup>

Other cases where negligence is charged under the Clean Water Act frequently involve either initial charges of knowing violations that are pleaded down to negligence or a decision to enter a preindictment plea agreement on negligence charges, even though there is evidence of knowing violations. An empirical study of Clean Water Act negligence cases from 1987 to 2000 determined that less than 7 percent of all environmental prosecutions involved negligence—and that nearly half of those cases (53 out of 117) also

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192. Clean Air Act § 113(c)(4), 42 U.S.C. § 7413(c)(4) (2006).

193. Resource Conservation and Recovery Act of 1976 § 3008(d), 42 U.S.C. § 6928(d) (2006).

194. 42 U.S.C. § 7413(c)(1).

195. *E.g.*, 33 U.S.C. § 1319(c)(4) (2006) (Clean Water Act); 42 U.S.C. § 6928(d)(3) (Resource Conservation and Recovery Act of 1976); 42 U.S.C. § 7413(c)(2) (Clean Air Act). Another example is the Superfund law, which makes it a crime to fail to report the release of a reportable quantity of a hazardous substance into the environment as soon as the defendant knows of the release. 42 U.S.C. § 9603. If the defendant did not know about the release, even if the defendant were negligent in failing to learn about the release, there would be no crime.

196. 427 F.3d 1278, 1280, 1283 (10th Cir. 2005). The other case is *United States v. Hanousek*, 176 F.3d 1116, 1121–22 (9th Cir. 1999).

197. When Mr. Ortiz continued his unpermitted discharges even after he had been told by inspectors that his discharges were entering the Colorado River through the sewer system, he was charged with felonies. *See Ortiz*, 427 F.3d at 1281.

involved knowing conduct.<sup>198</sup> The study concluded that prosecutors showed “restraint” in bringing negligence charges and only did so in cases where there was (1) catastrophic harm, like the *Exxon Valdez* oil spill; (2) gross negligence that resulted in significant harm; (3) knowing acts of pollution pleaded down to negligence; or (4) negligence that occurred along with knowing violations such as false statements or obstruction of justice.<sup>199</sup>

The Gulf oil spill is an atypical environmental crime for other reasons as well, at least insofar as the focus is on charges based on the spill itself. Most environmental crimes are felonies, and, like their counterparts in other federal law enforcement programs, environmental prosecutors avoid misdemeanor cases.<sup>200</sup> Yet environmental charges based on the spill are likely to be misdemeanors, which is ironic since it is the losses attributable to the spill that will make the criminal fine so large. Felony charges may be brought under the Seaman’s Manslaughter Statute<sup>201</sup> for the worker deaths that occurred on the *Deepwater Horizon* drilling rig. Felonies also are possible under the Outer Continental Shelf Lands Act if there were knowing and willful violations of drilling rules, or under Title 18 of the United States Code if prosecutors can demonstrate that corporate officials misled regulators either before or after the spill.<sup>202</sup> But the Clean Water Act charges—as well as any wildlife crimes charged under the Migratory Bird Treaty Act, the Marine Mammal Protection Act, or the Endangered Species Act—will likely be misdemeanors because the discharges occurred negligently.

Still another way that the Gulf oil spill may be different from most environmental crimes involves whether individuals will be charged. Prosecutors prefer to charge individuals in cases involving corporate crime, because the deterrent value of criminal prosecution is greater when corporate officials face incarceration.<sup>203</sup> Corporate officials are more likely to comply with the law when they fear that they may go to jail if their violations are discovered. Moreover, where a loss of personal freedom may result, corporate officials are less likely to discount the possibility of being caught, since the costs of being wrong are so great. If the only sanction is a monetary fine paid by the corporation, the same official may weigh the costs of paying a fine against the costs of complying with the law—and also may be more willing to

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198. Steven P. Solow & Ronald A. Sarachan, *Criminal Negligence Prosecutions Under the Federal Clean Water Act: A Statistical Analysis and an Evaluation of the Impact of Hanousek and Hong*, 32 ENVTL. L. REP. 11,153, 11,155–59 (2002).

199. *Id.* at 11,158–59. The study also found that, as the environmental crimes program matured, there may be a trend toward less frequent use of “pure” negligence charges. *Id.* at 11,157.

200. Most misdemeanor cases under the environmental laws involve wildlife crime, since most criminal provisions of the wildlife protection statutes are limited to misdemeanors. A notable exception is the Lacey Act, which makes it a felony to knowingly sell or knowingly purchase protected fish, wildlife, or plants. Lacey Act § 4(d), 16 U.S.C. § 3373(d) (2006). Another less frequently utilized felony provision of the wildlife laws is the Migratory Bird Treaty Act provision prohibiting the sale of migratory birds. Migratory Bird Treaty Act § 6, 16 U.S.C. § 707(b) (2006).

201. 18 U.S.C. § 1115 (2006).

202. See *supra* notes 25–26 and accompanying text.

203. Uhlmann, *Crimes on the Gulf*, *supra* note 114, at 32.

discount the possibility of a fine based on her assessment of the risk that the violations will be discovered. Indeed, it could be argued that the prior criminal cases against BP failed to change its corporate culture precisely because no individuals were prosecuted.

Absent false statements or obstruction of justice, however, the Justice Department may struggle to identify culpable individuals who possessed sufficient management authority in the Gulf oil spill. Unless the government departs from its prior practice and charges strict liability violations of the Migratory Bird Treaty Act,<sup>204</sup> only those directly involved in the oil spill can be charged with crimes. To charge individuals with a criminal violation of the Clean Water Act—the primary statute for addressing the spill—the government would need to show that the defendants acted knowingly (for felony charges) or negligently (for misdemeanor charges). Yet it is unlikely that senior executives of BP, Transocean, and Halliburton, who had the greatest influence over the corporate culture that made the spill possible, played such a personal role in the disaster.<sup>205</sup>

The question therefore becomes whether the government can identify individuals with enough supervisory responsibility and personal involvement to be blamed for the Gulf tragedy. The president's commission on the Gulf oil spill identified a number of shore-based engineers, supervisory personnel on the rig, and rig workers who were involved in the questionable decisions and the inadequate monitoring that contributed to the blowout.<sup>206</sup> If past cases are a guide, however, the Justice Department will not prosecute rig workers who carried out decisions by their supervisors, unless they made false statements or obstructed justice, because those individuals are needed as witnesses. The Justice Department may look more closely at the role of the shore-side engineers, but those engineers appear to have been merely technical advisors; they too may be more valuable as witnesses. That leaves only the supervisors on the rig as potential defendants, unless the Justice Department develops evidence that corporate executives were directing their activities.

There is precedent for prosecuting supervisory personnel on vessels—the functional equivalent of supervisors on the rig—for environmental crimes. As part of its vessel-pollution initiative,<sup>207</sup> the Justice Department has prosecuted captains and chief engineers who were supervisory officials

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204. Under the Migratory Bird Treaty Act, the unauthorized taking of migratory birds is a strict liability misdemeanor, which allows prosecutors to charge responsible corporate officials without evidence that they knew about the violations or acted negligently in their supervision of the activity that resulted in the unauthorized taking. See 16 U.S.C. §§ 703, 706. Historically, the Justice Department has not prosecuted pollution cases under strict liability theories absent negligence. See Uhlmann, *Crimes on the Gulf*, *supra* note 114, at 31. It therefore is unlikely that the government would charge corporate officials with Migratory Bird Treaty Act violations in the Gulf oil spill unless the individuals involved acted negligently.

205. Uhlmann, *Crimes on the Gulf*, *supra* note 114, at 32; Uhlmann, *Prosecuting Crimes Against the Earth*, *supra* note 114.

206. NATIONAL COMMISSION REPORT, *supra* note 36, at 89–127.

207. Uhlmann, *supra* note 166, at 42.



on ships that were polluting.<sup>208</sup> If the Gulf oil spill were treated like a vessel-pollution case, BP's well site leaders (the "company men" on the rig) and Transocean's supervisors could be prosecuted if they made the negligent decisions that were responsible for the blowout.

The analogy to vessel pollution cases may not be applicable, however, because the vessel pollution defendants were charged with knowing or intentional conduct, including false statements and obstruction of justice.<sup>209</sup> If the managers on the rig only engaged in negligent conduct, should they be charged in an unintentional oil spill that resulted from a corporate culture over which they had no control? It also may be difficult to argue that the negligence of a single individual or group of individuals caused the spill, since it is not clear which negligent acts triggered the blowout. As noted in Part II, the fact that the spill had multiple causes would be no defense to corporate negligence claims, since the acts of all corporate employees and agents can be attributed to the corporation.<sup>210</sup> But the same aggregate theory of liability cannot be used against individuals who, absent evidence of a conspiracy, are responsible only for their own actions.<sup>211</sup>

Moreover, the Gulf oil spill presents a significant proportionality problem for prosecutors considering charges against individuals. Because the spill resulted in such an environmental disaster and has received so much national and international attention, charging individuals would carry enormous weight. The government would be saying that a relatively small number of individuals are culpable for what has been termed the worst environmental disaster in U.S. history.<sup>212</sup> Of course, fairness concerns are not a legal defense to criminal charges, but they could influence how prosecutors exercise their discretion and how a jury perceives charges against individual defendants. To prosecute individuals successfully, the evidence of personal guilt must be both compelling and overwhelming.

As a result, unless there is evidence of communications between shore-side management and supervisors on the rig that would inculcate a large number of individual defendants, including some within senior management, the Gulf oil spill could be a corporate-only disposition. By itself that would not make the case an outlier; a number of major prosecutions of

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208. See, e.g., *United States v. Jho*, 534 F.3d 398 (5th Cir. 2008). Mr. Kun Yun Jho was the chief engineer on a ship that transferred bulk petroleum from offshore tankers to ports along the Gulf of Mexico. He was responsible for engine department operations and for maintaining the ship's oil-record log. *Id.* at 400.

209. See *id.* at 401.

210. See *supra* note 139 and accompanying text.

211. See generally *United States v. Sinskey*, 119 F.3d 712, 718–19 (8th Cir. 1997) (stating that aiding and abetting liability defendant must participate in unlawful activity).

212. Address to the Nation on the Oil Spill in the Gulf of Mexico, 2010 DAILY COMP. PRES. DOC. 502 (June 15, 2010) (statement of President Obama) ("Already, this oil spill is the worst environmental disaster America has ever faced."); *Gulf of Mexico oil leak 'worst US environment disaster'*, BBC NEWS (May 30, 2010, 4:49 PM), <http://www.bbc.co.uk/news/10194335> (statement of White House energy advisor Carol M. Browner to NBC's Meet The Press) ("More oil is leaking in the Gulf of Mexico than at any other time in our history. It means there is more oil than the Exxon Valdez (in Alaska in 1989):").

corporations have not resulted in the simultaneous prosecution of individuals.<sup>213</sup> But it is one more way that the Gulf oil spill would stand apart from paradigmatic environmental crime.

What the Gulf oil spill may lack in terms of intentional conduct, felony environmental violations, and individual defendants, it more than makes up in terms of harm. The worst tragedies often make the best cases, because the harm that occurs demonstrates why the underlying conduct is criminal. Jury appeal is greatest in cases where unlawful conduct results in significant harm to public health or the environment.<sup>214</sup> The Gulf oil spill involves significant harm in both respects, making it a far more compelling criminal case.

The overwhelming majority of environmental prosecutions, however, do not involve readily provable environmental harm, let alone the catastrophic harm present in the Gulf oil spill. Prosecutors in environmental crime trials often seek to exclude evidence that the violations did not cause environmental harm. They argue that environmental harm is not an element that must be proven and that its absence is not a defense to liability for environmental crime. The legal basis for the government's position is sound;<sup>215</sup> only knowing endangerment charges focus on harm, and they address instances where violations create an imminent risk of death or serious bodily injury, not environmental harm.<sup>216</sup> But the strategic reason that prosecutors seek to exclude evidence of harm is because there often is no evidence of harm, which could lead to jury nullification, or because the harm question is too esoteric and would produce a distracting and irrelevant expert debate about what constitutes environmental harm.<sup>217</sup>

In a certain sense, the harm that flows from traditional environmental cases exists in the context of aggregate effects: the sum total of all unlawful pollution is harmful, so prosecution of intentional acts of pollution is necessary to deter unlawful pollution even if the harm in a particular case is not significant (or is nonexistent). In other environmental prosecutions, the harm may be to the regulatory system, which cannot function properly if regula-

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213. See, e.g., *Emery Worldwide Airlines, Inc.*, No. 3:03-CR-00113 (S.D. Ohio 2003); *Motiva Enterprises, LLC*, No. 1:05-CR-00021 (D. Del. 2005).

214. Uhlmann, *supra* note 113, at 1247.

215. See Susan F. Mandiberg, *Locating the Environmental Harm in Environmental Crimes*, 2009 UTAH L. REV. 1177, 1178 (2009) (“[F]ew [environmental crimes] contain a ‘result’ element, and none require[] the government to prove the result of environmental harm.”).

216. See, e.g., Resource Conservation and Recovery Act of 1976 § 3008(e), 42 U.S.C. § 6928(e) (2006) (providing enhanced penalties for RCRA violations when the defendant knows “he thereby places another person in imminent danger of death or serious bodily injury”). As Susan Mandiberg notes, endangerment provisions appear to address environmental harm but they may also apply where harm to the environment is merely risked. Mandiberg, *supra* note 215, at 1192.

217. Uhlmann, *supra* note 113, at 1246 n.114; see also Mandiberg, *supra* note 215, at 1201–03 (noting the difficulty of defining environmental harm, assessing the extent of environmental damage, and resolving potential “‘battle[s] of the experts’”).

tors do not have truthful information about pollution.<sup>218</sup> Or the harm may accrue to competitors, who spend substantial funds on environmental compliance and should not be placed at a competitive disadvantage with companies who flout their environmental obligations.<sup>219</sup> But rarely does the harm in environmental cases approach the harm that resulted from the Gulf oil spill, which underscores the degree to which the Gulf oil spill will be different than most other environmental prosecutions.<sup>220</sup>

#### IV. RECONCILING THE GULF OIL SPILL CASE WITH THE ROLE OF ENVIRONMENTAL CRIMINAL ENFORCEMENT AND THE PURPOSES OF THE CRIMINAL LAW

I have asserted throughout this Article that the Gulf oil spill will result in a criminal prosecution, which will be the most significant environmental criminal case ever prosecuted and will produce the largest fines ever imposed for any corporate crime in the United States. I also have claimed that the Gulf oil spill will be an anomalous environmental prosecution that may skew public perceptions of environmental crime. Of course, these are predictions, not statements of fact: the Justice Department has confirmed the existence of a criminal investigation, but it has not yet announced whether any of the companies or individuals involved will be charged with crimes.

I nonetheless contend that the decision whether to prosecute was essentially made when BP failed to contain the spill and when it began to exact such a terrible toll on the Gulf and the communities along its shores. I say “essentially” because the government is predisposed to prosecute in cases involving significant harm, if a viable legal theory supports the charges. As discussed in Part II, such a theory is readily available in oil spill cases, where proof requirements are minimal. As a result, while final decisions may not have been made about which charges to bring and whether individual defendants should be prosecuted (which may generate debate within the Department), it is a foregone conclusion that there will be a criminal prosecution based on the Gulf oil spill.

Yet the likelihood of criminal charges does not resolve the normative question of whether criminal charges in the Gulf oil spill are an appropriate use of criminal sanctions under the environmental laws and under the criminal

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218. Uhlmann, *supra* note 113, at 1249 (stating that fair and effective administration of the environmental laws cannot happen without complete and accurate information from the regulatory community).

219. *Id.* (stating that companies that operate outside the regulatory system should not be allowed to have a competitive advantage over companies that make the necessary financial commitment to compliance).

220. To the extent that the public perceives the Gulf oil spill as epitomizing environmental crime, it may become more difficult to prosecute other environmental crimes. If judges and juries come to expect a correlation between environmental crime and environmental harm, prosecution could be more difficult in cases where there is no evidence of readily provable environmental harm. On the other hand, if the Gulf oil spill were not prosecuted, defense attorneys might argue that other environmental crimes should not be prosecuted because the harm was worse in the Gulf oil spill.

law more generally. Even if criminal charges are justified, the ways that the Gulf oil spill case is anomalous may raise issues for a theoretical account of criminal enforcement under the environmental laws. Will charges based on ordinary negligence blur the lines between criminal and civil enforcement? Does a prosecution predicated on harm undermine the appropriate focus on culpable conduct?

This Part considers the Gulf oil spill in the broader context of the role of criminal enforcement under the environmental laws and criminal law theory. I argue that criminal prosecution will have deterrent value that civil penalties alone would not, and will express societal condemnation of the Gulf oil spill in ways that civil enforcement cannot—but that criminal enforcement is not a substitute for more effective regulation of offshore drilling. I also suggest that Congress may want to reconsider the ordinary-negligence standard under the Clean Water Act, and caution that incidents with significant environmental harm can result in opportunistic prosecutions, although the findings of the presidential commission suggest that result will not occur here.

#### A. Deterrence and the Role of Societal Condemnation

Congress enacted the environmental laws to protect public health and the environment from the harmful effects of pollution.<sup>221</sup> Congress provided a range of enforcement options, including criminal, civil, and administrative penalties, to promote compliance with the laws and to deter violations that would undermine pollution control efforts.<sup>222</sup> Criminal penalties, including the possibility of imprisonment for individual defendants, were included because Congress recognized that some violators would not be deterred by civil or administrative penalties, and that some violations would be so egregious that civil or administrative penalties would provide insufficient punishment.<sup>223</sup> From this perspective, criminal prosecution of environmental violations is perhaps best justified by deterrence theory, inasmuch as it serves utilitarian concerns (i.e., the prevention of harm to public health and the environment) without regard to whether the underlying conduct would be morally wrongful absent a statutory prohibition.

By acknowledging the primary role that deterrence theory plays in criminal enforcement of the environmental laws, I do not suggest that envi-

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221. See, e.g., Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (2006) (“The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”); Resource Conservation and Recovery Act of 1976 § 1003(a), 42 U.S.C. § 6902(a) (“The objectives of this chapter are to promote the protection of health and the environment . . . .”); Clean Air Act § 101(b), 42 U.S.C. § 7401(b) (2006) (including as a goal the “protect[ion] and enhance[ment] [of air] quality . . . so as to promote the public health and welfare”).

222. See, e.g., 33 U.S.C. § 1319(a)–(c) (authorizing administrative, civil, or criminal enforcement for violations of the Clean Water Act).

223. See Raymond W. Mushal, *Up from the Sewers: A Perspective on the Evolution of the Federal Environmental Crimes Program*, 2009 UTAH L. REV. 1103, 1105 n.8 (2009) (referring to criminal enforcement as a “gorilla in the closet”).

ronmental crimes lack moral content. I have argued previously that ecological concerns have altered historical notions about the wrongfulness of pollution.<sup>224</sup> Environmental crimes such as knowing endangerment or contamination of public drinking water supplies are moral offenses that also warrant criminal sanction under a retributive theory of the criminal law.<sup>225</sup> Under retributive theory, we punish criminal wrongdoing because the conduct is inherently wrongful and deserves punishment, regardless of whether the punishment will deter future harm or serve other utilitarian goals.<sup>226</sup> Although punishment for environmental crimes such as recordkeeping violations might be hard to justify under a retributive theory, it is possible to justify criminal sanctions for some environmental violations (and perhaps many) under both deterrence and retributive theories of the criminal law.<sup>227</sup>

There is a good argument that the Gulf oil spill is the type of environmental violation that warrants punishment under both deterrence and retributive theories. The negligence that caused the Gulf oil spill can be seen as morally culpable, because the failure to take reasonable care in an offshore drilling context puts lives and the environment at risk. Indeed, the potential for harm was realized dramatically, beginning with the loss of life on the *Deepwater Horizon* and continuing with the ecological harm to the Gulf and the economic hardship to the communities along the Gulf shores. On this account, BP, Transocean, and Halliburton deserve to be punished for their negligence, which is a retributive justification.

Yet, while negligence that causes terrible harm may have moral content, retributive theorists have long rejected negligence as a basis for imposing criminal liability. They argue that crimes predicated on negligence do not have sufficient moral culpability to warrant criminal sanction, because defendants in negligence cases did not realize that their conduct could cause harm.<sup>228</sup> A retributive analysis of the Gulf oil spill, at least in its classic formulation,<sup>229</sup> would only impose criminal sanctions if there were evidence

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224. Uhlmann, *supra* note 113, at 1230.

225. See R.A. Duff, *Towards a Theory of Criminal Law?*, 84 PROC. ARISTOTELIAN SOC'Y SUPPLEMENTARY VOLUME 1, 23–24 (2010) (including “various kinds of pollution” in a listing of “wrongs of endangerment” that “we have good reason to criminalize”).

226. See, e.g., MICHAEL S. MOORE, *The moral worth of retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179 (Ferdinand Schoeman ed., 1987) (“Retributivism is the view that punishment is justified by the moral culpability of those who receive it. A retributivist punishes because, and only because, the offender deserves it.”).

227. The Model Penal Code has been described as an effort to incorporate the strengths of a utilitarian theory, a deterrence theory, and a retributive theory. See Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 815–17 (2003).

228. See, e.g., H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, in OXFORD ESSAYS IN JURISPRUDENCE 29, 44–45 (A. G. Guest ed., 1961), reprinted in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 136, 152 (2d ed. 2008); see also John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 AM. CRIM. L. REV. 111, 120–27 (1996).

229. Whether we should rethink the moral content of corporate negligence in the environmental context is a question that may warrant further inquiry but is beyond the scope of this Article.

that the companies knew that there was a risk of a blowout and its attendant harm, which is more akin to recklessness (a higher mental-state standard that includes disregarding known risks).

Criminal prosecution of the Gulf oil spill based on negligence therefore may fit more readily within a deterrence theory of the criminal law. The argument for criminal prosecution rests to a significant degree on the desire to ensure that a similar environmental tragedy does not occur again. Offshore drilling is inherently dangerous,<sup>230</sup> with potentially catastrophic public health and environmental consequences if it is not conducted properly. We want companies engaged in offshore drilling to make environmental protection and worker safety a priority. They must structure their management systems to ensure that exploration activities are conducted without causing harm. Criminal prosecution would be intended to make certain that BP, Transocean, and Halliburton engage in more careful drilling in the future (specific deterrence) and to promote better safety practices throughout the drilling industry (general deterrence).

In terms of specific deterrence, criminal prosecution should lead to significant changes in how BP, Transocean, and Halliburton conduct drilling operations, which is what occurred within Exxon after the *Exxon Valdez* prosecution.<sup>231</sup> In addition to the deterrent effect of record fines, criminal sentences are likely to include corporate compliance programs. If implemented properly, corporate compliance programs will require BP, Transocean, and Halliburton to make environmental protection and worker safety a much greater priority. While there are no guarantees that specific deterrence will occur—BP apparently was not deterred by its prior criminal convictions, which also required corporate compliance programs—it is unlikely that any company could endure the liabilities that would result from a second catastrophic spill.

From a general deterrence perspective, criminal prosecution should promote safer drilling by making the costs of risky behavior prohibitive for most companies—and crippling for even enormously profitable companies like BP. In addition, by also prosecuting Transocean and Halliburton, the government will make clear that drilling contractors share responsibility for environmentally sound practices and no longer can defer to the well owner or lessee. Promoting a more rigorous compliance culture among all the companies involved in offshore drilling will serve the broader deterrent goal of preventing future spills.

Of course, it could be argued that criminal prosecution is not needed to send the message that oil companies and drilling contractors do not want to be held responsible for a tragedy like the Gulf oil spill. BP, Transocean,

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230. See NATIONAL COMMISSION REPORT, *supra* note 36, at 91.

231. See *The Valdez Oil Spill*, EXXONMOBIL, [http://www.exxonmobil.com/Corporate/about\\_issues\\_valdez.aspx](http://www.exxonmobil.com/Corporate/about_issues_valdez.aspx) (last visited Mar. 4, 2011) (“In the aftermath of the Exxon Valdez accident, ExxonMobil redoubled its long-time commitment to safeguard the environment, employees and operating communities . . . . In the event a spill occurs, we also have improved our response capability.”).

Anadarko, and Mitsui face multi-billion-dollar civil penalties for their roles in the spill<sup>232</sup> (in addition to the more than ten billion dollars that BP has paid for well control and cleanup and the twenty billion dollars that BP set aside to compensate victims and pay natural resource damage claims).<sup>233</sup> Multi-billion-dollar civil penalties should be an incentive for companies involved in offshore drilling to ensure that they do not suffer a similar fate. Civil penalties have a deterrent effect, and the additional deterrence of criminal penalties could be cumulative.

Nonetheless, criminal prosecution may do more than civil penalties alone to bring about changes in how oil companies and drilling contractors conduct offshore drilling. First, the reach of the criminal law is broader, extending to all persons who negligently discharge oil in violation of the Clean Water Act.<sup>234</sup> Civil penalties apply only to owners, operators, or persons in charge of the offshore facility or vessel,<sup>235</sup> a limitation that may explain why Halliburton was not named in the civil suit filed by the Justice Department in December 2010. Second, it is unlikely that criminal penalties will be shifted from contractors to the well owner by the broad indemnification agreements that are common in the offshore drilling industry. Transocean and Halliburton had indemnification agreements with BP that required reimbursement of all costs (including penalties) incurred as a result of a well blowout.<sup>236</sup> Indemnification agreements may be unenforceable in the criminal context, however, since indemnification undermines the punitive nature of criminal sentencing. Taken together, the broader reach of the criminal law and the likely absence of indemnification for criminal fines would do more to ensure that well owners and drilling contractors share responsibility for environmentally sound practices than the imposition of civil penalties alone.

Criminal prosecution may also permit sanctions that may not be available in civil cases, which will increase its deterrent value. First, criminal conviction carries the possibility of suspension or debarment from government contracts until the convicted corporation corrects the condition giving

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232. The Clean Water Act provides for civil fines up to \$1,100 per barrel—nearly \$5 billion—and up to \$4,300 per barrel—possibly as much as \$20 billion—for any companies that were grossly negligent. Adjustment of Civil Monetary Penalties for Inflation, 69 Fed. Reg. 7124, 7125 tbl.1 (Feb. 13, 2004).

233. Graeme Wearden, *BP oil spill costs to hit \$40 bn*, GUARDIAN, Nov. 2, 2010, <http://www.guardian.co.uk/business/2010/nov/02/bp-oil-spill-costs-40-billion-dollars>; see also Julia Werdigier, *BP's Profit Declines On Oil Spill Charges*, N.Y. TIMES, Nov. 3, 2010, at B3.

234. Clean Water Act § 309(c)(1), 33 U.S.C. § 1319(c)(1) (2006) (“[a]ny person who . . . negligently violates section . . . 1321(b)(3)”).

235. 33 U.S.C. § 1321(b)(7)(A) (“[a]ny person who is the owner, operator, or person in charge of any vessel . . . or offshore facility from which oil . . . is discharged in violation of paragraph (3)” (emphasis added)).

236. Roger Parloff, *BP is not alone in Gulf exposure*, CNNMONEY.COM (June 11, 2010, 12:10 PM), [http://money.cnn.com/2010/06/11/news/companies/Parloff\\_legal\\_BP.fortune/index.htm](http://money.cnn.com/2010/06/11/news/companies/Parloff_legal_BP.fortune/index.htm) (“Both Halliburton . . . and Transocean . . . have claimed in SEC filings or in congressional testimony that they have broad indemnification agreements with BP that will leave BP holding the bag for virtually all the spill costs . . .”).

rise to the violation.<sup>237</sup> Although there is some question about whether the government would debar a company as large as BP<sup>238</sup>—and, even if they were debarred, the suspension would last only until BP came into compliance—loss of government contracts is a significant sanction in criminal cases. Second, corporate criminal defendants must pay full restitution to victims. In civil cases, economic damages fall within the seventy-five-million-dollar damage cap set by the Oil Pollution Act and only extend to the responsible parties, who, in the case of the Macondo well, would be the lessees (BP, Anadarko, and Mitsui).<sup>239</sup> The Justice Department included allegations of gross negligence, willful misconduct, and violation of federal safety regulations in its civil complaint, which, if proven, would remove the liability limits of the Oil Pollution Act.<sup>240</sup> But the government would only need to prove ordinary negligence to trigger criminal restitution (albeit under a beyond-a-reasonable-doubt standard as opposed to a preponderance-of-the-evidence standard). BP has indicated that it will not seek the protection of the liability cap, but none of the other companies involved in the spill have agreed to waive the liability cap and to pay any cleanup costs or damages.

Criminal prosecution also is warranted because of what it communicates about the negligent conduct that made the Gulf oil spill possible. Criminal sanction and punishment have an expressive dimension that reflects our societal views of the underlying conduct.<sup>241</sup> We make clear that conduct is outside the bounds of acceptable behavior when we label it criminal. By criminally prosecuting BP, Transocean, and Halliburton, we condemn the lax corporate management that allowed such a terrible tragedy to occur and the ways in which the companies took risks and deviated from standard industry practices.

Scholars disagree about whether the expressive function of punishment represents an alternative broad-based theory of the criminal law or merely reinforces the underlying deterrence or retribution.<sup>242</sup> But whether viewed as

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237. 33 U.S.C. § 1368(a) (prohibiting federal contracting with any person convicted under the Clean Water Act “until the [EPA] Administrator certifies that the condition giving rise to such conviction has been corrected”).

238. Ron Nixon, *Size Protects Government Contractors That Stray*, N.Y. TIMES, Dec. 18, 2010, at A12.

239. See Oil Pollution Act § 1004(a)(3), 33 U.S.C. § 2704(a)(3) (2006) (seventy-five-million-dollar liability limit); 33 U.S.C. § 2701(32)(C) (definition of responsible party for offshore facilities).

240. See *id.* § 2704(c)(1)(A) (exception to limits on liability if incident proximately caused by gross negligence, willful misconduct, or violation of a federal safety regulation or operating regulation by a responsible party).

241. See Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397 (1965), reprinted in JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 95–118 (1970).

242. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 595–97 (1996). For example, Kahan argues that expressive theory accounts for the public rejection of alternative sanctions, which neither a retributive theory nor a deterrence theory can otherwise



a standalone theory or as a corollary to deterrence or retribution theory, there is no question that criminal prosecution has a stigmatizing effect that civil enforcement does not. "Criminal law is ultimately different from tort and other civil law, not because it demands more culpability but because of the condemnation it imposes on its transgressors."<sup>243</sup> Indeed, civil violations can be resolved without any admission of liability; criminal violations require a defendant to admit culpability (in this case negligence), a public acknowledgement of guilt and acceptance of responsibility that increases the stigma associated with a criminal conviction.<sup>244</sup>

Conversely, if the Justice Department declines criminal prosecution of the Gulf oil spill, it would diminish the seriousness of the negligence that caused the spill. As Dan Kahan explains, "when society deliberately foregoes answering the wrongdoer through punishment, it risks being perceived as endorsing [the misconduct] . . . ."<sup>245</sup> The mixed message of a decision not to prosecute would be even greater here because the president of the United States announced that there was a criminal investigation of the Gulf oil spill. The attorney general has continued to emphasize the criminal investigation in his public comments, most recently when he announced the filing of the civil suit based on the spill at a press conference with the administrator of the EPA. As in other contexts where sanctions are threatened but not imposed, the wrong message would be sent, and deterrent value would be lost, without a criminal prosecution.

At the same time, there are limits to the deterrent value of a criminal prosecution. To prevent future oil spills, the government must prohibit the conduct that caused the Gulf oil spill and take strong enforcement action against companies that violate drilling rules. The government already requires companies to inspect and maintain equipment such as blowout preventers; it should develop comparable regulatory requirements under the Outer Continental Shelf Lands Act to govern the circulation of drilling mud, cement seals, negative pressure readings, and other procedures that were not conducted properly in the days and hours before the blowout.<sup>246</sup>

It is unlikely BP, Transocean, and Halliburton would face criminal prosecution but for the tragic harms caused by the Gulf oil spill. If the same conduct had occurred, but the blowout preventer prevented a discharge, it is unlikely that anyone outside the government and the drilling industry would

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explain. *Id.* at 605–30. Kahan notes, however, that many scholars either disregard expressive theory entirely or view it as a restatement of retributive or deterrent accounts. *Id.* at 595–97.

243. John L. Diamond, *The Crisis in the Ideology of Crime*, 31 *IND. L. REV.* 291, 311 (1998). Notably, Diamond also expressed concern that "what is criminally wrong and right must be something more than what is merely civilly wrong and right." *Id.* at 309.

244. *But see* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 *HARV. L. REV.* 1477, 1508–09 (1996) (questioning whether corporate reputational loss from criminal penalties is greater than when comparable civil penalties are imposed).

245. Kahan, *supra* note 242, at 598.

246. The presidential commission on the Gulf oil spill reached a similar conclusion, arguing that another spill was "inevitable" absent both improved industry practices and enhanced regulation. John M. Broder, *Tougher Rules Urged For Offshore Drilling*, *N.Y. TIMES*, Jan. 12, 2011, at A12.

have known about the near miss. If the same conduct had transpired but there were no worker deaths, and the spill was limited to a few hundred barrels of oil, BP would have faced only civil or administrative penalties. Indeed, Transocean experienced a similar incident on one of its rigs in the North Sea—where drilling laws are more rigorous—but only three barrels of oil were discharged and no criminal charges have been brought for its negligence.<sup>247</sup> In the United States, there were twenty-eight major drilling-related spills, natural-gas releases, or well-control incidents in the Gulf of Mexico during 2009, including a loss of well control and an explosion in April that did not result in a major spill only because the blowout preventer worked.<sup>248</sup> No criminal charges were filed.

Criminal law theorists caution that we undermine deterrent effects when we prosecute only if harm results from negligent or reckless conduct.<sup>249</sup> The defendants in negligence or recklessness cases do not intend to cause harm; rather, they fail to apprehend the risk of harm or disregard known risks because they do not believe the harm will materialize.<sup>250</sup> Under this argument, what should be deterred is the conduct that causes the harm, rather than simply the harm.<sup>251</sup> If the sanction only occurs when the harm occurs, the deterrent effect will diminish as the risk of harm diminishes or as the company involved becomes less cognizant of the risk.<sup>252</sup> A similar pathology may have occurred before the blowout of the Macondo well—rig workers and their supervisors tragically underestimated the risks of their conduct—and could remain going forward.

Offshore drilling is an inherently risky business, but never before in over forty years of drilling on the Gulf had there been a catastrophe like the Gulf oil spill. Even after the Gulf oil spill, drilling companies may be discounting the risk that a similar tragedy will happen again. A criminal prosecution would help reduce this complacency by increasing the costs of an oil spill and by expressing societal condemnation in ways that civil sanctions alone cannot. We should recognize, however, that a more robust regulatory scheme with appropriate criminal and civil enforcement for violations may do more to deter risky behavior than a record-breaking criminal prosecution in the rare case where a blowout occurs with catastrophic harm.

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247. Tom Bergin, *Shell Urges U.S. to adopt North Sea drilling rules*, REUTERS, Oct. 14, 2010, available at <http://www.reuters.com/article/2010/10/14/us-shell-safety-idUSTRE69D3YV20101014>; Robbie Brown, *Another rig's close call altered rules, papers say*, N.Y. TIMES, Aug. 17, 2010, at A19.

248. See Russell Gold & Ben Casselman, *Far Offshore, a Rash of Close Calls*, WALL ST. J., Dec. 9, 2010, at A1.

249. See, e.g., Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1539–44 (1974).

250. See Schulhofer, *supra* note 249, at 1539–41.

251. See Ronald J. Allen, *Retribution in a Modern Penal Law: The Principle of Aggravated Harm*, 25 BUFF. L. REV. 1, 19 (1975).

252. Schulhofer, *supra* note 249, at 1542.

B. *What Makes Environmental Violations Criminal and the Problem of Clean Water Act Negligence Cases*

The theoretical challenge presented by criminal enforcement under the environmental laws is the difficulty of articulating a principled account about which violations of the environmental laws are criminal. The environmental laws make only limited distinctions between what violations are criminal and what are civil or administrative violations.<sup>253</sup> In most instances, the conduct requirement for criminal prosecution is no different than for civil enforcement. The only additional proof required in a criminal case is that the defendant must have acted with the requisite mental state, which for most environmental crimes means proof that the defendant acted “knowingly” when she committed a prohibited act.<sup>254</sup>

The Supreme Court has never addressed what it means to act knowingly under the environmental laws, but the courts of appeals have uniformly held that “knowingly” requires proof that the defendant had knowledge of the facts that constitute the violation; knowledge of the law is not required.<sup>255</sup> For example, in a hazardous waste disposal case, courts have required the government to show that the defendant knew that (1) the material involved was waste; (2) the waste had the substantial potential to be harmful to public health or the environment; and (3) the waste was disposed. Courts have not required the government to show that the defendant knew the waste met the legal definition of “hazardous waste” or that disposal required a permit. In so ruling, courts have invoked the familiar maxim that “ignorance of the law is no defense” and have rejected the argument that knowledge of illegality should be required in areas of regulatory complexity such as environmental law.<sup>256</sup>

The requirement of showing only knowledge of the facts is the mental-state standard for most federal crimes.<sup>257</sup> There may be some merit, however, to suggestions that knowledge of the facts does not distinguish criminal violations from civil violations under the environmental laws.<sup>258</sup> Many violations of the environmental laws occur with knowledge of the

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253. Uhlmann, *supra* note 113, at 1242.

254. *See id.* at 1235–39.

255. *See, e.g.,* United States v. Hopkins, 53 F.3d 533, 537–40 (2d Cir. 1995) (Clean Water Act); United States v. Buckley, 934 F.2d 84, 88–89 (6th Cir. 1991) (Clean Air Act and CERCLA); United States v. Hoflin, 880 F.2d 1033, 1036–37 (9th Cir. 1989) (Resource Conservation and Recovery Act of 1976). *But see* United States v. Johnson & Towers, Inc., 741 F.2d 662, 669 (3d Cir. 1984) (requiring knowledge that a permit was required in criminal prosecution for Resource Conservation and Recovery Act hazardous waste violations).

256. By requiring knowledge of the facts, rather than knowledge of illegality, courts have imposed a duty on corporations to know their obligations under the environmental laws and have thus avoided the perverse incentives that might arise if ignorance of those obligations provided a defense in criminal prosecutions under the environmental laws.

257. *See* Uhlmann, *supra* note 113, at 1235–39. The most notable exceptions are criminal tax violations.

258. *See, e.g.,* John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 217 (1991).

facts, regardless of whether they result in criminal or civil enforcement. For example, if a company is unable to control its discharges within permit limits, and if it monitors its discharges as required, the company “knows” that its discharges are at elevated levels. If the company honestly reports the elevated discharges, it is unlikely to face criminal prosecution, unless the discharges continue for such a long period of time that the government concludes the company is not making a good faith effort to correct the violations.<sup>259</sup> In contrast, if the company attempted to cover up the discharge violations through false statements, criminal prosecution would occur (if the concealment scheme were discovered).<sup>260</sup> The rationale for criminally prosecuting the company that attempts to hide its violations should be clear. One company is honestly participating in the self-reporting system established by the environmental laws, while the other is using that same system to cheat and hide its violations. Both companies, however, have knowingly violated the underlying statutory and regulatory provisions that limit lawful discharges.

If it can be difficult to distinguish criminal and civil cases based on a “knowingly” standard, the problem necessarily becomes worse if criminal prosecution occurs based on a lesser standard such as ordinary negligence, as is possible in misdemeanor cases under the Clean Water Act.<sup>261</sup> Most discharges that do not occur knowingly involve at least some human error and therefore could support negligence charges. Even cases that would appear to satisfy only a strict-liability standard—for example, a discharge that occurred during a hurricane—could involve negligence if the defendant failed to take adequate steps to prevent the discharge. The availability of negligence charges thus excludes only a very small category of Clean Water Act violations, if any, from possible criminal enforcement.

The likely use of negligence charges in the Gulf oil spill could highlight the fact that the Clean Water Act makes little distinction between criminal and civil violations. Moreover, it would demonstrate how the ordinary-negligence standard allows prosecutors to seek criminal charges in Clean Water Act cases based on an after-the-fact analysis of the reasonableness of a defendant’s actions—an analysis that may not be moored to any governing regulatory standard. In the deepwater drilling context, if a discharge of oil occurs and causes a sheen on the water, the act requirement for criminal prosecution is met. Criminal liability then attaches if the defendant’s conduct fails the reasonable person test for negligence, in which the relevant focus will be the drilling activity. Yet the Clean Water Act tells us nothing about what constitutes improper drilling activity, except that drilling cannot result in a prohibited discharge of oil.

The Outer Continental Shelf Lands Act could provide a normative framework to evaluate whether negligent conduct caused the Gulf oil spill.

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259. See Uhlmann, *supra* note 113, at 1252.

260. See *id.* at 1248–49.

261. See *supra* note 140 and accompanying text.

The Justice Department's civil complaint alleges violation of regulations promulgated under the Outer Continental Shelf Lands Act. Similarly, prosecutors may claim that BP, Transocean, and Halliburton were negligent because their conduct violated drilling regulations. Their ability to do so, however, may be hampered by the general language of the drilling regulations and the extent to which the alleged violations may have been sanctioned by MMS officials.

As a result, the decision whether to seek criminal charges for the Gulf oil spill—and the determination of guilt once the case reaches court—may depend upon expert opinions about best practices for activities such as the circulation of drilling mud, the testing of cement seals, and the inspection of blowout preventers, juxtaposed with what regulatory officials at MMS stated were acceptable practices for the Macondo well. Of course, our legal system frequently makes determinations about reasonable care based on expert opinions, and negligence is a basis for imposing criminal liability in cases such as vehicular homicide. In vehicular homicide cases, however, negligence is predicated on a defendant engaging in underlying conduct that is illegal, such as driving while impaired or driving at excessive speeds, and often involves knowledge of risk that is not required under the Clean Water Act.<sup>262</sup> In the Gulf oil spill, absent proof that drilling regulations were violated, the underlying conduct may have been legal or at least condoned by regulators. Criminal responsibility thus will be based on the kind of after-the-fact determination of whether the defendants acted with reasonable care normally associated with tort cases.<sup>263</sup>

A heightened criminal negligence or recklessness standard might provide a more meaningful basis for imposing criminal liability under the Clean Water Act.<sup>264</sup> Criminal negligence imposes liability only when a defendant's conduct involves a substantial deviation from standards of reasonable care,<sup>265</sup> which distinguishes criminal liability from tort liability. Recklessness adds the requirement that a defendant be aware of the risk associated with her conduct,<sup>266</sup> which adds a mental state element more akin to what is required in criminal cases. Use of either a criminal negligence standard or a recklessness standard would also provide a more logical graduated penalty scheme under the Clean Water Act. The Act currently

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262. See, e.g., *People v. Decina*, 138 N.E.2d 799, 803 (N.Y. 1956).

263. See generally Susan J. LaBine & Gary LaBine, *Determinations of Negligence and the Hindsight Bias*, 20 LAW & HUM. BEHAV. 501 (1996); Philip G. Peters, Jr., *Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 ARIZ. ST. L.J. 1277 (1999); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998) (exploring hindsight bias and discussing how laws, such as tort rules, address it).

264. In *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), the defendant argued that a criminal negligence standard should be required under the Clean Water Act, but his position was rejected by the Ninth Circuit. *Id.* at 1120–21.

265. Under the Model Penal Code, a person acts with criminal negligence when she “should be aware of a substantial and unjustifiable risk that . . . will result from [her] conduct.” MODEL PENAL CODE § 2.02(2)(d) (1962).

266. See *supra* note 133 and accompanying text.

alternates between civil and criminal penalties as the violations become more egregious. Discharges that occur without fault are strict liability civil violations; negligent discharges are misdemeanors; grossly negligent discharges carry heightened civil penalties; and knowing discharges are felonies.<sup>267</sup> A more rational penalty scheme might reserve criminal penalties for knowing or reckless discharges—or at least criminal negligence—while providing graduated civil penalties depending upon whether the defendant's conduct involved ordinary negligence or strict liability.

The Gulf oil spill case may not involve the theoretical problems raised by Clean Water Act negligence charges if there is evidence that BP, Transocean, and Halliburton intentionally departed from industry norms or ignored known risks—in other words, if their conduct involved criminal negligence or recklessness. Even without evidence of criminal negligence or recklessness, there may be less concern about imposing criminal liability under an ordinary negligence standard in a case like the Gulf oil spill where the harm is so great. Indeed, it could be argued that cases involving significant harm, much like homicide cases, should allow for criminal prosecution based on lower mental-state standards. As currently formulated, however, the Clean Water Act makes no such distinctions, so any discharge that results from negligence can give rise to criminal liability. Congress therefore should consider limiting criminal liability for ordinary negligence to cases of endangerment (as under the Clean Air Act) or cases that involve substantial harm to the environment (like the Gulf oil spill), and should otherwise require at least criminal negligence or recklessness for criminal prosecution.

### C. *Environmental Harm and Opportunistic Prosecution*

The limited statutory guidance about which environmental violations are criminal increases the degree to which environmental law relies on the sound exercise of prosecutorial discretion. Scholars have debated whether Congress delegated too much authority to prosecutors to determine when environmental violations are criminal.<sup>268</sup> The significance of that debate—and our ability to answer the normative question about what makes environmental violations criminal—depends upon whether we can identify the discretionary factors that should trigger criminal enforcement. I have suggested that “criminal prosecution should be reserved for cases involving (1) significant harm or risk of harm to the environment or public health, (2) deceptive or misleading conduct, (3) [facilities that] operate outside the

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267. See Clean Water Act § 311(b)(7)(A), 33 U.S.C. § 1321(b)(7)(A) (2006) (strict liability civil penalties); 33 U.S.C. § 1319(c)(1) (negligent misdemeanor criminal penalties); *id.* § 1321(b)(7)(D) (gross negligence civil penalties); *id.* § 1319(c)(2) (knowing felony criminal penalties).

268. Compare Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2487 (1995) (expressing concern about the amount of discretion delegated to prosecutors), with Kathleen F. Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 84 IOWA L. REV. 115, 127–29 (1998) (arguing that broad discretion is a fundamental aspect of all criminal enforcement programs).

environmental regulatory system, or (4) significant and repetitive violations of environmental laws.<sup>269</sup> Focusing criminal enforcement efforts on cases involving these factors would not narrow the statutory definition of environmental crime, but it could mitigate concerns about whether prosecutors have too much discretion.

Initially, the Gulf oil spill does not appear to raise any issues under a theoretical construct that includes significant harm or risk of harm to the environment or public health as one of the criteria that make environmental violations criminal.<sup>270</sup> The spill produced all of the harms that the environmental laws seek to prevent: deaths, ecological devastation, and economic losses. The only past violation involving anything approaching comparable harm was the *Exxon Valdez* oil spill, which was a smaller discharge, resulted in no deaths, and caused fewer economic damages.

Nor is the emphasis on harm simply a theoretical construct. The EPA emphasizes cases involving significant harm in its policy regarding the exercise of investigative discretion.<sup>271</sup> The Justice Department focuses on harm in its policy governing the exercise of prosecutorial discretion in cases of corporate misconduct.<sup>272</sup> The federal sentencing guidelines proscribe longer sentences in cases that result in significant harm to the environment or public health.<sup>273</sup> Even critics of environmental criminal enforcement concede that cases involving harm or risk of harm may be appropriate for criminal prosecution.<sup>274</sup> When an environmental “violation puts the environment or public health at risk,” environmental protection is compromised and “there are significant societal costs” that may warrant sanctions.<sup>275</sup>

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269. Uhlmann, *supra* note 113, at 1226, 1246–52.

270. As noted in Part III, the Gulf oil spill could also involve false statements or concealment if evidence shows that corporate officials misled MMS about conditions at the well or the amount of oil gushing from the well. False statements and obstruction of justice fall well within the heartland of environmental criminal prosecution. For the purposes of this discussion, however, our focus is on the spill itself, without regard to whether any violations were exacerbated by false or misleading conduct.

271. See Memorandum from Earl E. Devaney, Dir., Office of Criminal Enforcement, Envtl. Prot. Agency, to all EPA Employees Working in or in Support of the Criminal Enforcement Program (Jan. 12, 1994), available at <http://www.epa.gov/compliance/resources/policies/criminal/exercise.pdf>.

272. See U.S. DEP'T OF JUSTICE, *supra* note 155, at tit. 9, ch. 28. The Justice Department's corporate prosecution policy lists environmental crimes as an example of crime that may raise a substantial risk of harm to the public and may therefore warrant criminal prosecution. *Id.* at tit. 9, ch. 28.200(B). The policy also identifies “the nature and seriousness of the offense, including the risk of harm to the public;” as the first factor to be considered in determining whether to pursue criminal charges. *Id.* at tit. 9, ch. 28.300.

273. Under Section 2Q1.2(b)(1)(A) of the federal sentencing guidelines, the recommended sentence is increased if there is a discharge into the environment, and the amount of the increase is adjusted upward or downward depending partly upon the harm that occurs. U.S. SENTENCING GUIDELINES MANUAL § 2Q1.2 cmt. 5 (2010). The guidelines also call for a longer sentence if the violation results in substantial cleanup costs. *Id.* § 2Q1.2(b)(3).

274. See, e.g., Coffee, *supra* note 258, at 217 (identifying knowing commissions of environmental crimes such as willful endangerment as “serious offenses that do not merit leniency”).

275. See Uhlmann, *supra* note 113, at 1247.

The danger in cases involving environmental harm or public health effects, however, is not that criminal prosecution cannot be justified as a reasonable exercise of prosecutorial discretion. The concern is that the egregiousness of the harm will divert attention from the culpability of the underlying conduct. Harm cases have the potential to create a tautology: because there was significant harm, criminal prosecution will occur regardless of whether the conduct involved serious violations or whether there was a substantial causal link between any violations and the resulting harm. Harm cases can easily become criminal prosecutions in search of a theory of liability that, no matter how attenuated, will provide a legal basis for prosecuting under circumstances in which few will protest. Our concern and anger over environmental harm, particularly when accompanied by injury or death, can displace sober analysis of whether the defendant engaged in conduct that warrants criminal sanction. When that occurs, the risk is that the government will prosecute opportunistically—because it can justify charges and may prevail despite the thinness of its case—thus undermining principles of fairness and blurring the lines between criminal and civil violations.<sup>276</sup>

The potential for opportunistic criminal prosecution is great in a case like the Gulf oil spill. The *Exxon Valdez* prosecution provides precedent. The harm could not be much worse. The companies involved have criminal histories (BP), questionable safety records (Transocean), and poor public images (Halliburton). Fighting criminal charges would prolong a public relations nightmare for the companies and would create destabilizing uncertainty about the extent of their financial liabilities. While public sentiment may be less charged than it was when oil was still gushing into the Gulf, the government could be criticized for being too lenient or too pro-business if the result is anything less than felony prosecution of the corporate defendants and jail time for corporate executives.<sup>277</sup>

Moreover, we tend to assume when a tragedy like the Gulf oil spill occurs that someone must be at fault and should be held accountable. From that assumption, it may not be a large leap to the conclusion that fault and accountability mean criminal culpability, particularly when criminal liability can be imposed based on a minimal showing of ordinary negligence. We view the harm as an intolerable violation of societal norms that justifies criminal sanction if, with the benefit of hindsight, we can find fault in the underlying conduct, which is not difficult in complex engineering activities like offshore drilling.

Of course, the risk of opportunistic prosecution in harm cases does not mean that the Gulf oil spill will result in a problematic criminal prosecution. BP, Transocean, and Halliburton engaged in conduct that made a catastrophic blowout possible, which would be objectionable even if no spill had occurred. As a result, criminal prosecution of the Gulf oil spill will be based

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276. *Id.* at 1247–48.

277. Uhlmann, *Prosecuting Crimes Against the Earth*, *supra* note 114.



on a combination of culpable conduct and resulting harm, which involves an appropriate exercise of prosecutorial discretion. The broader normative point, however, is that the government should be able to identify why the conduct is culpable without regard to the resulting harm.<sup>278</sup> Except under strict liability schemes,<sup>279</sup> conduct is not culpable simply because harm occurs. When we prosecute based on harm alone, without also requiring culpable conduct that warrants criminal sanction, we further collapse the distinction between criminal and civil violations—and between crimes and torts.

### CONCLUSION

Criminal prosecution of the Gulf oil spill became inevitable when BP could not stop the flow of oil from the Macondo well and could not prevent the resulting oil slick from reaching the shores of the Gulf of Mexico. Because of the notoriety of the case, the Gulf oil spill will be seen by many as the paradigmatic environmental crime. Yet the case is better understood as an outlier crime that raises difficult normative questions about how we criminalize ordinary negligence under the Clean Water Act and about the role of environmental harm in criminal prosecutions.

The government should criminally prosecute BP, Transocean, and Halliburton notwithstanding the issues that the case will raise. Criminal prosecution will help deter future oil spills and will express societal outrage about the spill in ways that civil penalties cannot. The enforcement response to the Gulf oil spill needs to make clear that it is unacceptable for corporations to put profits before safety and the environment.

Criminal prosecution is not a substitute, however, for more vigilant regulation of drilling activity and more robust enforcement of laws governing drilling activities. The Gulf oil spill has demonstrated that we cannot rely on oil companies and their contractors to safeguard sensitive ecosystems like the Gulf of Mexico. Nor should we allow a criminal prosecution to distract us from the larger question of our societal responsibility for the *Deepwater Horizon* tragedy. BP, Transocean, and Halliburton—and other companies who do business on the Gulf—conduct dangerous exploration activities because of the market demand that we provide. Until we cure our national addiction to oil, we will continue to put the environment at risk with ever-bolder efforts to drill miles beneath the ocean floor.

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278. See Allen, *supra* note 251, at 3; Schulhofer, *supra* note 249, at 1510–11 (“[M]ost American jurisdictions exclude retaliation from the legitimate goals of the criminal law, and legal theorists are virtually unanimous in applauding the judgment.”).

279. As noted in Part II, the Migratory Bird Treaty Act contains strict liability criminal provisions. The Justice Department usually does not prosecute those crimes absent proof of negligence. See *supra* note 148.